MAR 10 1902

SUPREME COURT OF LOUISIANA.

No. 13,701.

STATE OF LOUISIANA

Versus

NEW ORLEANS WATERWORKS COMPANY.

Copy of Record,
Pleadings and Judgment.

WALTER GUION,
Attorney General.
BENJAMIN RICE FORMAN,
Of Counsel for the State of Louisiana.
SAMUEL L. GILMORE,
City Attorney
for the City of New Orleans, intervenor,

J. R. BECKWITH,
E. HOWARD McCALEB,
FARRAR, JONAS & KRUTTSCHNITT,
Attorneys for Defendant.

SUPREME COURT OF LOUISIANA.

No. 13,701.

STATE OF LOUISIANA

versus

NEW ORLEANS WATERWORKS COMPANY.

PLEADINGS AND JUDGMENT.

Petition Filed January 23rd, 1899.

To the Honorable the Civil District Court for the Parish of Orleans, Louisiana:

The petition of the State of Louisiana herein appearing through Milton J. Cunningham, Attorney Genereal of the State of Louisiana, respectfully shows:

(1) That the City Council of New Orleans has by resolution, requested him to bring this suit, as appears by a certified copy annexed and made part hereof.

(2) A joint committee of the Senate and House of Representatives of the State of Louisiana has investigated the affairs of the New Orleans Water Works Company, and after such investigation the General Assembly referred the matter to the

Attorney General to bring suit to forfeit the charter of the said Water Works Company, or to take such action as he thought proper.

Petitioner avers that in 1877 the General Assembly of Louisiana, "to enable the City of New Orleans to promote the public health, and to afford greater security against fire, and to improve and extend the water works of New Orleans, and to furnish the inhabitants of New Orleans an adequate supply of pure and wholesome water," passed Act 33 of Extra Session of 1877, approved by the Governor, 31st March, 1877, which was amended by Act 43 of 1878, approved February 26th, 1878, and both of said statutes are made a part of this petition.

Pursuant to said statute the New Orleans Water Works Company was organized as a corporation domiciled in New Orleans and the Water Works, its plant, pumps, machinery and pipes, etc., tools, material on hand then belonging to the City of New Orleans, were turned over to the said Company. In consideration of the grant of the franchise to be a corporation and the powers and privileges mentioned in the statute, the said Company was obliged in the interest of the public health and welfare to do the things required in the act of incorporation, which it has failed to do, notwithstanding repeated demand, and it has been guilty of repeated and continuous active violation of its obligations and duties to the people, and has thereby forfeited its charter and franchises.

(1) first and chief obligation was to furnish the inhabitants of New Orleans with an adequate supply of pure water for all purposes. Although it has been in operation more than twenty years, it has never, at any time, furnished the in-

habitants of New Orleans with *pure water,* but only with an insufficient and very inadequate supply of very muddy water.

(2) This muddy and very impure water has been, and is now, wholly inadequate to extinguish fires, to wash the yards, alleys and streets, and to suppy the inhabitants with water for bathing and domestic purposes, and at no time, was the water furnished fit for drinking or cooking.

(3) It was the duty of the Company, six months after its organization in March, 1878, to proceed to the erection of new works and pipes sufficient in capacity to furnish a full and adequate supply of water and year by year to complete the same, so as to give an adequate supply of water to the people of New Orleans (exclusive of the Fifth District). This it has never done, and has thereby forfeited its exclusive privileges as provided in the 13th section of its charter. Now after over twenty years, according to its published reports, there are only 121.5 miles of water mains (petitioner denies that there are so many); while there are 580 miles of improved or built-up streets, with houses needing an adequate supply of pure water, less than 21 per cent., being less than one-fifth the amount nenessary for an adequate supply of water. The water said Company furnishes is muddy and unfit to be taken into the human stomach, and unfit for steam engines, and the said Company's water is not accessible to more than one-fifth of the houses in New Orleans for extinguishing fires, or washing yards or streets.

(4) Where the mains are laid the supply has been, and is, so inadequate that the firemen could not, and cannot, get water to extinguish the fires, and many millions of dollars of prop-

erty have been lost or destroyed in consequence of the derelictions of duty on the part of said Company in not furnishing an adequate supply of water.

(5) The said Company was, and is, prohibited by Sec. 15 of its charter from charging for the use of water supplied by it any more than the rates paid to the City of New Orleans in 1877; the Legislature meaning thereby, the rates legally fixed and adopted by the City Council in 1870, which were the only rates legally in force and legally exacted by the City of New Orleans in 1877; and petitioner avers ;that th;e said Company has habitually, from 1878 to the present time, illegally exacted and collected greater rates than those legally exacted and collected by the City of New Orleans for same quantities of water supplied, or same facilities and opportunities for drawing water from its pipes.

(6) It was, and is, and always has been since the organization of the said New Orleans Water Works Company, its duty as a public corporation, affected with a public use and charged with a public duty, to treat all inhabitants alike, and to charge and exact from each inhabitant to whom it furnished water, or who applied for water, the same sum of money for same or similar service, and to impartially enforce and collect its legal rates against all, without fear or favor, and also to charge the large and wealthy consumer proportionately, for the water taken, or services rendered, to the small and poor consumer. In violation of this legal duty, it has never impartially done its duty in that respect, nor has it ever impartially or without favor enforced its own illegal rates, but has constantly and habitually shown favoritism and charged and exacted higher rates from some than from others for similar ser-

vice, and the same quantity of water, or the same facilities for using water, and has exacted from the large and wealthy consumer much less in proportion than from the small and poorer consumer, and has thus added to the wealth of the rich, and oppressed and impoverished the poor.

(7) It was, and is prohibited by its charter, from declaring or paying any dividends except out of the net semi-annual or annual receeipts after payment of all expenses of operation, and the expenses of the gradual extension of its mains and pipes. contemplated by its charter, so as to supply an abundant and fully adequate supply of pure water to all the inhabited portions of the City of New Orleans and after the payment of its interest on its bonded debt. In violation thereof, it has illegally declared and paid dividends, year after year, when it has not extended its pipes and water service as required, and when it had not paid all expenses of operation and of the small and inadequate extension of its mains and pipes which it had made, and the interest on its bonded debt, and it borrowed money on anticipated future revenues to pay dividends, and dividends were declared and paid from other sources than its net profits, and when there were legally no net profits, all in violation of law, and it thereby crippled and disabled itself, so that it was less able to fulfill its important duty to the public in furnishing an adequate and abundant supply of pure water to all parts of the City of New Orleans along and through its 580 miles of built-up streets.

(8) It has not complied with its conttract with the City of New Orleans, dated 3rd October, 1884, because it has not maintained a head or pressure of 50 feet from 7 a. m. to 6 p. m., as required by said contract, a copy of which Act is annexed

and made part of this petition, and in consequence the people along the mains suffered from an inadequate supply, and immense losses from fires resulted, because the firemen could not obtain enough water to extinguish fires.

(9) The management has been negligent and needlessly expensive and detrimental to the public weal, shown by the fact that although coal, materials, machinery and labor are all cheaper now than in 1878, yet the cost of (by reason of its management) pumping 1,000,000 gallons of water to-day, 1898, is greater than it was in 1877, and thereby it has crippled itself and rendered itself less able to fulfill its first and great duty to the public, and for which it was created, to-wit: to furnish to all the inhabitants of the City an abundant and adequate supply of pure water tthrough and along all its 580 miles of built-up streets.

(10) The New Orleans Water Works Company has accepted the benefits of Act 56 of 1884 of the General Assembly, amending its charter by Act passed before Jos. D. Taylor, Notary, 3rd October, 1884, and by receiving from the City of New Orleans ever since money for water for public buildings, washing streets and extinguishing fires, and therefore the New Orleans Watr Works Company held its charter subject to the provisions of the Constitution of 1879, (see Art. 234) and thereby its monopoly and exclusive privileges became extinct, abandoned, renounced and abolished. (Constitution 1879, Articles 46, 248 and *258*). Thereby Article 258 of the Constitution of 1879 becomes operative and applicable to the New Orleans Water Works Company, and its monopoly and exclusive privilege became abolished and extinct.

(11) It, in 1878 or 1879, illegally sold or issued its own

stock of the par value of $100 at $33 per share, where it had no power to issue it at less than $100 per share.

(12) By Section 9 of its charter the defendant Company was forbidden to issue any bonds or mortgages without the consent of the Council of the City of New Orleans, and then only for the purpose of improving and enlarging its works and increasing its supply of pure water, and the said New Orleans Water Works Company has illegally evaded said prohibition and has done indirectly what it was prohibited from doing directly, by issuing Demand Notes reaching $110,000 in amount, either for the purpose of illegally paying dividends which it had never earned or of paying for its inadequate extensions, instead of issuing its mortgage bonds for enough to complete a distribution of its mains through the built-up portions of the streets.

WHEREFORE: Petitioner prays that the New Orleans Water Works Company, through R. E. Craig, its President, be cited, and that its charter and all its franchises be forfeited and it be enjoined from tearing up the public streets and from pursuing its business, reserving the right to apply for the appointment of a liquidator to liquidate its affairs; and, in the alternative, should this relief not be granted, that then it be decreed that the New Orleans Water Works Company has forfeited all exclusive privileges, and the City of New Orleans has the right to contract with any one else for a supply of water and to expropriate its tangible property if it sees fit, and the city of New Orleans be decreed to be free of all of the franchises and privileges of the New Orleans Water Works Company, and it be decreed that, having accepted and received the benefits of Act 56 of 1884, its monopoly and exclusive privileges and fran-

chises became thereby extinct, abandoned and abolished, by operation of Articles 234 and 258 of the Constitution of 1879 and to no longer exist, and that the city of New Orleans is free to contract with any person or corporation to furnish its inhabitants with an abundant supply of pure water fit for all purposes and without let or hinderance from the New Orleans Water Works Company, and for costs and for general relief.

M. J. CUNNINGHAM,
Attorney General.

BENJAMIN RICE FORMAN,
Of Counsel.

CITATION AND RETURN OF SERVICE.

State of Louisiana, Civil District Court for the Parish of Orleans.

In the City of New Orleans.

No. 58,345.

STATE OF LOUISIANA VERSUS N. O. WATERWORKS CO.

To the New Orleans Water Works Company, Through R. E. Craig, Its President, New Orleans, La.:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or deliver your answer to the same, in the office of the Clerk of the Civil District Court for the Parish of Orleans, within ten days after the service thereof.

Witness the Honorables F. A. Monroe, N. H. Rightor, T. C. W. Ellis, Fred. D. King and Geo. H. Theard, Judges of the said court, this 23rd day of January, in the year of our Lord 1899.

P. J. FOURNILLON,

[Seal] *Deputy Clerk.*

Indorsed—No. 58,345. Civil District Court for the Parish of Orleans. Docket 5. State of Louisiana vs. New Orleans Water Works Company. M. J. Cunningham, Atty. Gen. Benjamin Rice Forman, Attorney. Copy of petition and citation inside to be served on The New Orleans Water Works Company, through R. E. Craig, its President. Received, New Orleans, Jan. 23, 1899, and on the 24th day of January, 1899, served a copy of the within citation and accompanying petition on the New Orleans Water Works Company, defendant herein, by personal service on R. E. Craig, its President. Returned same day. Sheriff's fees $1.50. J. Arthur Blanc, Deputy Sheriff.

THE STATE OF LOUISIANA VERSUS THE NEW ORLEANS WATER WORKS COMPANY.

Civil District Court, Parish of Orleans.

No. 58,345.

EXCEPTION.

And now comes the said defendant, the New Orleans Water Works Company by its undersigned Attorneys, and in no wise admitting the truth of any allegation in the said plaintiff's petition contained, excepts to the plaintiff's petition herein and for exception saith:

That the said petition does not contain "a clear and concise statement of the object of the demand as well as of the nature of the title or the cause of action on which it is founded" as required by the Code of Practice sufficient in law or justice to require this defendant to plead thereunto or to take issue of fact thereon in form as the same is pleaded and of record in this cause for the following reasons and particulars amongst others, to-wit:

FIRST: That the general averment contained therein immediately preceding the sub-division of said petition into alleged causes of forfeiture marked and designated as "First," in which general averment it is charged and stated that the defendant "has been guilty of repeated and continuous active violation of its obligations and duties to the public and has thereby forfeited its charter and franchise," or words to that effect, is in all things too vague, uncertain, unfair, and insufficient in law to require this defendant to take issue of fact thereon as an alleged ground or cause of forfeiture and does

not advise this defendant of any particular act or acts or of their character, particulars or dates as required by law, nor is it sufficient in certainty, statement, or designation to advise or inform this defendant or the issue sought to be made or of the evidence or proofs required to defend against the said loose general and unlawful averment and that this defendant ought not in law to be required to take issue of fact thereon as an alleged cause of forfeiture or answer the same in manner and form as set forth in said petition.

SECOND: That the sub-division of said petition into alleged causes of forfeiture marked and numbered "Fourth," wherein it is averred in words, substance, and effect that *"Where the mains are laid the supply has been and is so inadequate that the firemen could not and they cannot get water to extinguish the fires, and many millions of dollars of property have been lost or destroyed in consequence of the dereliction of duty on the part of said company in not furnishing an adequate supply of water;"* and that portion of the eighth sub-division or alleged cause of forfeiture set forth in said petition, in which it is stated in words or substance that *"the people along the mains suffered from an inadequate supply and immense losses from fires resulted because the firemen could not obtain water enough to extinguish fires,"* are as averments of alleged grounds of forfeiture too vague and uncertain to require this defendant to take issues of fact thereon as pleaded, not only for the reasons above stated in reference to the part of said petition last above objected and excepted to; but because the said averments do not aver and charge any description or designation of character, ownership, or location of any of the property alleged to have been lost or destroyed, nor the dates of such pretended

loss or destructions, nor the particular dates or character of the alleged derelictions being the alleged cause of such averred destruction. That the petition charges the defendant with having had corporate existence of more than twenty years, thus rendering the averments in the petition more vague and uncertain, and furnishing the defendants with no information as to what alleged act or acts are or will be relied on by the plaintiff to support said alleged ground of forfeiture or by what proof or evidence these general vague allegations can be met and overthrown.

Tœ|84: That the same objection and cause of exception exists and is made as to and concerning the alleged cause of forfeiture in sub-division in said petition numbered "Fifth" contained, for that said sub-division fifth does not set forth or state when, by what means, and upon what authority, and at what date the City of New Orleans had or has established water rates to be paid by consumers of water from the mains and pipes of the Water Works Company, nor the rate and alleged charges that were established as averred, nor the persons or corporations that are alleged to have been over-charged, nor does it designate the premises supplied with water or the dates when supplied and over-charged, nor the rates of alleged legal charges that it is averred should have been made and received, nor the names of the persons or corporations alleged to have been overcharged.

FOURTH: The same cause of objection and exception exists and is made as to and concerning the sub-division of alleged causes of forfeiture in said petition numbered "Sixth," for that it is in said sub-division stated and charged by broad, general averment covering more than twenty years of the life

of this defendant, that this defendant has failed "*to impartially enforce and collect its legal rates against all without fear or favor and also to charge the large and wealthy consumers proportionately for the water taken or services rendered to the small and poor consumers. In violation of this legal duty it has never impartially done its duty in that respect nor has it ever impartially or without favor enforced its own legal rates, but has constantly and habitually shown favoritism and charged and exacted higher rates from some than from others for similar service and the same quantity of water, or the same facilities for using water and has exacted from the large and wealthy consumers much less in proportion than the small and poorer consumer and has thus added to the wealth of the rich and oppressed and impoverished the poor.*" Defendant avers that this allegation as an alleged cause of forfeiture is too vague, uncertain, insufficient and unfair to require this defendant to make answer thereunto in form as pleaded for the reasons among others that it covers a period of more than twenty years, does not give the names of those who are alleged to have been discriminated against; the names of those alleged to have been preferred, nor the date of any such alleged act, nor the names of those who have been made poorer and by what act and to what extent they have ben so affected, nor at what dates, nor where they resided, nor any alleged specific act of the defendant by which said result was produced; that the same vagueness and indefiniteness of allegation exists as to those alleged to have been made richer and that said sub-division "six" as an alleged cause of forfeiture is for the above and other reasons insufficient in law to compel this defendant to take issues of fact thereon as an alleged ground of forfeiture.

WHEREFORE, this defendant, for the reasons and upon the grounds above set forth excepts to said petition as too vague indefinite and uncertain and too much at variance with the requirements of the Code of Practice to require this defendant to make any other defense thereto or to take issue of fact thereto or to take issue of fact thereon and prays that this exception may be sustained by the Court and this defendant exempted from making answer to said petition until the same shall have been made certain as to all portions thereof and all alleged grounds of forfeiture therein stated which are herein excepted to, and until the said petition, either by amendment or bill of particulars shall have been so framed as to comply with the requirements of the Code of Practice in such cases made and provided and that the plaintiy pay all costs of this exception; and upon failure of plaintiff to amend its petition so as to conform to the prayer of this exception and to the order of the Court that its suit be dismissed at its costs, and defendant prays for all further and general relief.

J. R. BECKWITH,

E. HOWARD M'CALEB,

FARRAR, JONAS, KRUTTSCHNITT & GURLEY,

Attorneys for Defendant.

And for further exception herein the defendant excepts to all that portion of the prayer in said petition contained and set forth which is substantially in the words and figures following, to-wit: "And in the alternative that this relief should not be granted, then that it be decreed that the New Orleans Water Works Company has forfeited all exclusive privileges, and the City of New Orleans has the right to contract with any one else for a supply of water, and to expropriate its tangible property if it sees fit, and the City of New Orleans be decreed to be free of all the franchises and privileges of the New Orleans Water Works Company; that it be decreed that having accepted and received the benefits of act 56 of 1864, its monopoly and exclusive privileges and franchises became thereby extinct, abandoned and abolished in 1879, and no longer exist and that the City of New Orleans is free to contract with any person or corporation to furnish its inhabitants with an abundant supply of pure water, fit for all purposes, and without let or hindrance from the New Orleans Water Works Company."

FOR, that the said portion of the prayer of the said petition is a prayer for affirmative relief by judgment in favor of, and for the benefit of the City of New Orleans, relating to matters in which the State of Louisiana has no legal interest or right to stand in judgment for the City of New Orleans, and that cannot be lawfully litigated in an action to which the City of New Orleans is not a party asking for such judgment and relief in its own behalf.

WHEREFORE, this defendant prays that this exception be maintained and the said plaintiff, the State of Louisiana be directed and decreed to eliminate and abandon so much of the prayer of said petition as is herein excepted to at plaintiff's cost; and defendant prays for all further and general relief.

J. R. BECKWITH,
FARRAR, JONAS, KRUTTSCHNITT & GURLEY,
E. HOWARD M'CALEB,

Attorneys for Defendant.

STATE OF LOUISIANA VERSUS N. O. WATER WORKS CO.

Civil District Court, Division E.

No. 58,345.

To the Honorable, The Civil District Court For the Parish of Orleans:

The petition of the City of New Orleans, herein appearing through its Mayor, Walter C. Flower, with respect shows:

That in accordance with Ordinance No. 15,284 C. S., approved May 3rd, 1899, a certified copy of which is hereto annexed and made part hereof, it is the desire of the City of New Orleans to intervene in this proceeding and join the plaintiff herein.

Petitioner, therefore, begs leave to intervene, and in intervening reiterates all and singular the allegations of the petition filed by the plaintiff herein, and makes the same her own.

Wherefore, petitioner prays that she be allowed to intervene herein, and that the defendant be duly cited according to law, and that after due proceedings had there be judgment as prayed for herein, in the original petition filed by the State of Louisiana herein,

And for all general relief.

SAM'L L. GILMORE,
City Attorney.

JAMES J. MCLOUGHLIN,
Ass't. City Attorney.

Service Accepted,

B. R. FORMAN, of Counsel for State of Louisiana.

STATE OF LOUISIANA VERSUS N. O. WATER WORKS CO.

Civil District Court for the Parish of Orleans.

No. 58,345.

Answer of Defendant to Intervention of City of New Orleans.

And now comes the said defendant, the New Orleans Water Works Company, by its undersigned attorneys, and peremptorily excepts to the intervention of the City of New Orleans in this cause joining the State of Louisiana, plaintiff herein, and for the grounds of exception amongst other causes manifest on the face of the record saith:

FIRST: That proceedings for the forfeiture of the charter and franchises of corporations granted by the state must be instituted and prosecutetd by the State to the exclusion of all other parties and persons, and the City of New Orleans discloses in its petition herein no right or authority to intermeddle therein in behalf of the State of Louisiana as plaintiff herein, even if the record did not disclose other and sufficient reasons in law against any right of said City of New Orleans to intervene in aid of the State.

SECOND: That if under any possible conditions, the City of New Orleans could lawfully intervene in aid of the State as the law and the record in this cause now stands, the City of New Orleans is by law and good conscience and public policy prohibited from such intervention in this cause for the following reasons, amongst others, to-wit:

It appears from the record herein and matters of which the

court must take judicial notice that, if any of the matters set forth in the petition herein as alleged causes and grounds of forfeiture of defendant's charter and franchises are true and sufficient in law to warrant the forfeiture prayed for by the State (which defendant at all times denies), then and in that case, the City of New Orleans having exercised the right of administration of the affairs of the defendant corporation to the extent of three-sevenths (3-7) of the entire Board of Directors of the defendant corporation and was to the extent of its said control and representation an actor in and perpetrator of all of the alleged acts and averred wrongs complained of by the State of Louisiana in its petition herein sought to be adopted by said intervenor, and cannot in law be permitted to seek or demand in the courts relief of any kind, whether direct or indirect predicated on alleged wrongs in the commission of which it participated and holds any share of profits alleged to have accrued from the alleged unlawful acts charged against the defendant corporation in the petition of the State herein formally adopted by said intervenor.

And because it appears from the record herein that the City of New Orleans was the original and sole owner of all of the shares of the capital stock of the New Orleans Water Works Company at the time of its organization as a corporation, the entire twenty thousand shares of said stock having been delivered to the City of New Orleans in full title and ownership and therefore there is not a single share of said capital stock in the hands or ownership of shareholders other than the City of New Orleans by sale thereof by said city with full warranty of title, possession and property therein in the vendees or as-

signees thereof in all things binding on the City of New Orleans in favor of all owners and holders of shares of the said capital stock, wherefore the City of New Orleans is both in good conscience and law estopped from any attempt either to destroy said property, impair its value or dispossess the owner thereof by this or any other proceeding in the courts.

THIRD: That for the reasons above stated and the law, the said City of New Orleans is without lawful right or authority to appear herein by intervention joining the plaintiff herein in matter and form as attempted herein, but is in all things both in law and good conscience prohibited therefrom.

Said defendant prays that its said exception above pleaded may be sustained and the intervention of the City of New Orleans be dismissed with costs.

And for further peremptory exception herein, said defendant saith that the fact is that at the days and dates named in said petition of the State of Louisiana herein sought to be adopted by the City of New Orleans in its said petition of intervention herein, at the date of the institution of this action by the State, at the date of the filing of said petition of intervention and at all times since that date, the City of New Orleans has been and still, as a municipal corporation, is the owner and holder of a large number of the shares of the capital stock of the defendant corporation, the said New Orleans Water Works Company, never at any time less than thirty-nine hundred and twenty-seven shares thereof, and has at all times participated in the management of the affairs of said corporation to the extent of three-sevenths of all the capital stock thereof and also in the benefits, dividends and profits thereof to the extent of its actual holding of shares therein, and is in law

in all things estopped from assailing or attacking the defendant corporation or the rights, or property of its co-shareholders of the capital stock of said defendant corporation by or through said intervention or by any other form of action by reason of any matters alleged in said petition of the State of Louisiana herein, while the city is a shareholder of the capital stock of said defendant corporation and while the city holds the above-stated relation to its co-shareholders as above pleaded and as shown by the record in this cause.

Wherefore, defendant prays that its exceptions may be maintained and the said intervention of the City of New Orleans herein be dismissed with costs.

J. R. BECKWITH,
FARRAR, JONAS, KRUTTSCHNITT & GURLEY,
E. HOWARD M'CALEB,
Attorneys for the N. O. Water Works Co., defendant.

STATE OF LOUISIANA VERSUS N. O. WATER WORKS CO.

Civil District Court of the Parish of Orleans.

No. 58,345.

To the Honorable, the Judges of the Civil District Court in and for the Parish of Orleans:

The petition of intervention of the Board of Liquidation of the City Debt, a body corporate, created by the act of the General Assembly No. 133 of 1880, and by the act of the General Assembly No. 110 of 1890, amendatory of the first mentioned act, duly organized, exercising the powers and performing the

duties conferred and prescribed by the said acts, and the act of the General Assembly No. 67 of 1884, respectfully shows:

That it has an interest in this suit, by reason of which, it desires to and does unite with the defendant in resisting the claims of plaintiff.

That by section 2 of the said act of 1880 your petitioner is given exclusive control and direction of all matters relating to the bonded debt of the City of New Orleans; that by section 5 of said act it was made the duty of the authorities of the City of New Orleans, as soon as possible after the organization of petitioner, to turn over and transfer to it all of the property of the City of New Orleans, both real and personal, not dedicated to public use, and by said section your petitioner was empowered and authorized to dispose of said property on such terms and conditions as might be deemed favorable, the proceeds of said sale or sales to be deposited with the fiscal agent of the board, at the credit of the "City Debt Fund;" that by section 8 of said act, petitioner is directed to use the proceeds of the sale of all the assets in its possession, under the provisions of said act, and after paying the interest coupons of the bonds issued under the same, to use the surplus for the purchase and retirement of any valid bonds of the City of New Orleans, at a rate not exceeding fifty cents on the dollar, or at the discretion of the board, for the retirement of the bonds created by said act.

That no bonds were issued under the said act No. 133 of 1880, for causes irrelevant to the issue involved in this suit, but by the act of the General Assembly No. 58 of 1882, the City of New Orleans, through your petitioner, was authorized and empowered to extend its bonded indebtedness, other than

Premium Bonds, outstanding at the passage and promulgation of the said act, for a period of forty years from January 1st, 1883, at a rate of interest not exceeding 6 per cent, provided that the city should have the right to call in said bonds so renewed or extended, for payment, at par, after the year 1895, upon giving notice to that effect, during a period of three months; that under the power and authority granted by said act of 1882, the city, through your petitioner, took up and retired, by exchange for the bonds authorized by said act, outstanding of the said city, other than Premium Bonds, to the amount of $3,259,000.00, by the issuance and exchange therefor of the same amount of 6 per cent bonds authorized by said act; and for the payment of said bonds, the "City Debt Fund" mentioned and referred to in section 5 of the act of 1880 was specially set apart and dedicated exclusively; that the proceeds of all the property turned over and delivered to your petitioner, under said section 5 of the act of 1880, were part of said "City Debt Fund."

That by section 3 of the act of the General Assembly No. 67 of 1884, section 5 of the said act of 1880 was amended and reenacted, in words and figures, which repeated the direction of the said authorities to turn over and deliver to your petitioner, immediatetly after the passage of the act, all property of the city, real and personal, not dedicated to public use, which was followed by the direction to dispose of the same, and apply the proceeds to the retirement of the bonds authorized by the act of 1882, and the payment of the interest thereon, provided that the tax authorized by section 11 of act 133 of 1880 should not be levied; that such tax was never levied; that from this direction to sell and dispose was specially excepted by section

5, stock held in corporations, of which class of property the City of New Orleans then was the owner of 3,925 shares of the capital stock of the New Orleans Water Works Company, and no other.

That by section 1 of said act 67 of 1884, section 2 of the said act of 1880 was amended and re-enacted, so as to repeat the incorporation of your petitioner, and its exclusive control and direction of all matters relating not only to the bonded debt, but also the judgment debt of the City of New Orleans, and provided for the issue of bonds for the retirement, by the proceeds of sale, or the exchange thereof, of the entire debt of the City of New Orleans, in the form of executory judgments, registered under the provisions of act No. 5 of 1870, then or thereafter to be rendered upon floating debt claims created in the year 1878, or any previous years.

That the city having failed to comply with section 5 of the act of 1880, in its original form, and as amended by section 3 of the act of 1884, to transfer, turn over and deliver to your petitioner its said shares of stock, your petitioner proceeded by mandamus in this court to compel the performance of the duty enjoined upon said city as aforesaid; that the said mandamus was made peremptory, by judgment of this court, which commanded the city to transfer, deliver and turn over to your petitioner the said shares of stock, which said judgment, on appeal by the City of New Orleans to the Supreme Court, was affirmed; see 36 An., p. 524.

The New Orleans Water Works Company having resisted the transfer of the said shares of stock to your petitioner, and refused to pay it the dividends, your petitioner subsequently instituted a suit in this court against the said company, to

compel the transfer of said stock and the payment of the dividends thereon, to it, and having obtained judgment, recognizing the rights it claimed, and the Water Works Company, although the city joined as a co-defendant in said suit, and acquiesced in the judgment therein rendered in favor of your petitioner, carried the case by appeal to the Supreme Court, which affirmed the judgment of this court; see 39 An., p. 202.

That the right of your petitioner to the said stock, to be used for the purpose of paying the interest and principal of the bond obligations of the City of New Orleans, under the statutes named, was thus twice recognized and affirmed by the Supreme Court of the State.

That by a joint resolution of the General Assembly of 1890, an amendment, looking to the retirement of the entire outstanding bonded debt of the City of New Orleans, evidenced otherwise than by Premium Bonds, and the judgment debt fundable or payable under act No. 67 of 1884, was proposed, and act No 110 of 1890 adopted, to carry it into effect, if the amendment itself was adopted by the people at the general election held in the year 1892; that said amendment was so then and there adopted, and in consequence, said act 110 of 1890 went into full operation and effect; that by section 11 of said act, your petitioner, as constituted at the date of the said act, to-wit, July 8th, 1890, was created a body corporate, with right of existence and succession, until January 1st, 1903, and all provisions of then existing laws prescribing any duty, or conferring any power or function upon your petitioner, as well as all its rights to assets and property of the city, not dedicated to public use, were maintained and confirmed in full force.

That ever since the said act No. 67 of 1884 went into effect,

by section 5 of which your petitioner was deprived of any power to sell or dispose of the said shares of capital stock, the dividends have been applied to meeting the semi-annual interest of outstanding bonds of the City of New Orleans.

That there is now immediate, pressing, and absolutely necessary use and requirement for the said dividends, which are and will be used in meeting the semi-annual interest upon the floating debt bonds of the City of New Orleans, issued under the provisions of article 313 of the constitution of 1898; that said bonds authorized by said article, to the extent of $250,000, have been issued in the payment and retirement of floating indebtedness of the City of New Orleans, incurred for general and ordinary municipal purposes, during the years from 1879 to 1895, inclusive; that the surplus revenues of those years, which the said article directed the City of New Orleans to turn over and deliver to your petitioner, for the purpose of meeting the semi-annual interest upon said bonds, is entirely insufficient to accomplish that purpose; in point of fact, the amount realized from that fund, up to the present time, being much less than the sum required to pay the first accruing semi-annual interest upon the said bonds, due and payable April 1st, 1899; that the provisions of said article 313, to the effect that your petitioner, in the event that the said surplus revenues should not suffice, should sell whatever number might be required of constitutional bonds of the City of New Orleans, issued under said act 110 of 1890, and the said constitutional amendment, to provide for the principal and interest of said bonds, are unconstitutional, null, void and of no effect, in that they are in violation of section 10 of article 1, and the 14th amendment, of the Constitution of the United States, and hence, that

your petitioner is without power and authority to do as is directed in this regard by said article 313, the same, in the respect mentioned, being violative of the rights of the holders of Premium Bonds, of said Constitutional Bonds, of bonds issued by the Drainage Commission of the City of New Orleans, and contractors under the same, created by act No. —— of 1896, in its original form, and as amended by act No. —— of 1898, and other parties whose rights are protected by the contract evidenced by the said constitutional amendment of 1892, and the said act 110 of 1890, for the reason that by said amendment and act, especially section 3 of the latter, neither said constitutional bonds, nor the proceeds thereof, can be used for any purpose other than those specified by said amendment and act, in which the use and purpose of the said bonds prescribed in said article 313 of the Constitution of 1898 is not included; that your petitioner, for this reason, will at no time issue or sell any of said Constitutional Bonds, as directed by, and for the purposes named in, said article 313.

That besides the dividends on said Water Works stock, there are no other funds now, or hereafter, to come into the possession of your petitioner, under existing laws, and existing at the date of the adoption of the Constitution of 1898, which could be lawfully used for the purpose of meeting the interest on said floating debt bonds.

That your petitioner, by the laws of its creation, and those governing its action, is a trustee for every holder of a bond or bonds of the City of New Orleans, and as such, the guardian of their rights, among which are to preserve and protect its possession and administration of all property committed to its care, and dedicated and set apart by law for the payment of

the interest and principal of the said bonds; that the said shares of the capital stock of the said company are held by it in trust for the purposes for which they are by law placed in the possession of your petitioner, and its *cestui que trust* are entitled by law to the dividends produced by said shares of stock, and it is the duty of petitioner to preserve and protect the same by all lawful means; that if the charter of the said New Orleans Water Works Company be forfeited, by the judgment plaintiff seeks in this case, it will at once put at end to all revenue producing power of said shares of stock, and will greatly, if not entirely, destroy their value.

That petitioner further shows, that this suit is wholly unfounded, both as to the facts and law relied upon to maintain it; and to each and all of the allegations contained in plaintiff's petition, your petitioner pleads the general issue; and for further answer to the said petition, it specially sets up and pleads the following defenses:

First. That the duty of the said company, as to the kind and extent of the water to be supplied by it, is to furnish water in such condition as it is found in theMiss issippi river, which, by authority of section 5 of act 33 of 1877, is its source of supply, and the company has sufficiently discharged its duty, if the water so furnished is of such degree of purity as it is found in the said river.

Second. That the company has at all times supplied a sufficient quantity of water for the extinguishing of fires and the washing of yards, alleys and streets, and the inhabitants of the said city, which water possessed a degree of purity, and was in such condition otherwise, as was in accordance with every requirement of its duty, and the law.

Third. That the requirements of its charter that, within twelve months after its organization, in March ,1888, it should proceed to the erection of new works and pipes, sufficient in capacity to furnish a full and adequate supply of water, to be drawn from the Mississippi river, or elsewhere, as it might deem expedient, was not intended to mean, nor did it mean, anything more than that the company should supply new works and pipes, in its then existing system, when needed; that the direction of section 13 of the said act of 1877 was fully complied with; that any extension of the works of the company, beyond the territory reached by its extension, at the date of the adoption of the said act, to-wit, March 31, 1877, was required only on condition that the wants of the population should require the same, and that the estimated revenue on the cost of such extension should be equal to 10 per cent per annum; that by the said act there is no authority established over the said company, to determine, as against its judgment to the contrary, that the wants of the population demanded such extension, and that it is the sole judge of the same; that at no time have the said wants required such extension, nor at any time have the same produced a revenue of 10 per cent per annum upon the cost thereof; that no demand has ever been made upon the company, by any person or authority having the right to make such demand, or by any person or authority, that such extension be made; that in any event, the company is the sole judge of the necessity or expediency of such extension, and that in its judgment the same is not and has not been at any time either necessary or expedient.

Fourth. That as a matter of fact, the supply of water furnished by the said company has at no time been inadequate for

the extinguishing of fires, but, if the averments of the petition were true in this regard, the extent of the company's duty in this respect is prescribed by section 11 of the said act of 1877, by its provision that the company shall place, free of any charge whatever, two hydrants, of the most improved construction, in front of each square, where a pipe shall be laid, at a suitable distance from each other, from which a sufficient quantity of water might be drawn for the extinguishing of fires watering the streets, cleansing the gutters, and other public purposes; the quantity of water to be thus supplied is fixed by said section 11, under which, the said company has fully discharged its duty, and performed whatever obligation in this respect may be fixed by law.

Fifth. That the said company has never at any time charged for the use of water more than the rates fixed by law; and petitioner expressly denies that the company was confined to the rates fixed at any time by any ordinance of the Council of the City of New Orleans; it is expressly denied that the company has at any time illegally exacted or collected greater rates than it had the legal right to charge, or that it at any time withheld facilities or opportunities from any person for the drawing of water from its pipes; that it has impartially enforced and collected, indiscriminately, from all consumers of water, no more than the legal rates for the use of the same.

Sixth. Petitioner expressly denies that the company has declared or paid any dividend upon its stock, except out of net profits earned, or without having paid and discharged all expenses of operation, and all disbursements for certain extensions of and repairs to its mains, pipes and other works; that it borrowed no money on anticipated revenues, to pay dividends.

Seventh. That it has fully complied with its contract with the City of New Orleans, of October 3rd, 1884, and it is expressly denied that it violated or disregarded the said contract in the respect charged by the plaintiff's petition.

Eighth. That the affairs of said company have been prudently and carefully administered; that its expenditures for labor, machinery, materials, coal and other supplies. have been purchased and paid for at prices at all times as low as the same could be obtained; that it has not crippled itself, or rendered itself unable to fulfill any of the duties imposed upon it by law, but, on the contrary, it is fully able to perform the same, having abundant resources for that purpose, and that it will continue so to do, during its corporate existence.

Ninth. Petitioner further shows, that act 56 of 1884 was not in any sense a renewal, alteration or amendment of the charter of the New Orleans Water Works Company, nor was it in any sense a law for the benefit of the said corporation, in the sense of article 234 of the Constitution of the State of Louisiana of 1879, nor in any other sense, but was adopted by the General Assembly to meet the urgent public necessity therefor, which was a consequence of the decision of the Supreme Court of the State in the case of City of New Orleans vs. Water Works Company, No. 9007 of its docket, 36 An., p. 433, et seq., by effect of which, the exemption of the company from taxation, and the accompanying use of water by the city free of charge, became null and void, or inoperative; that said act of 1884 was a law conferring power on the City of New Orleans to make the contract therein described, and to provide a supply of water to the city by said company, in case of municipal taxation thereof, and to authorize provision

for the payment therefor; that the said law was enacted from causes solely due to the successful attempt of the City of New Orleans to disregard the company's charter exemption from taxation, and under the belief that it was necessary to give the city power to contract for the supply of water; that the said statute in no event, by any fair or proper interpretation thereof, has the effect of subjecting the said company to the provisions of the Constitution of 1879, to any greater extent than it was so subjected prior to the adoption of the said statute, and especially did not and could not make the company amenable to articles 46, 248 and 258 of the said constitution.

Tenth. Further answering, petitioner further specially denies that the company, illegally or otherwise, sold or issued its own stock at thirty-three dollars per share, in violation of its charter, and it expressly denies that if the company had so done, at the time and in the manner, and form, as charged, in the petition, it would be a violation of its charter.

Eleventh. Further answering, petitioner expressly denies the averments of fact contained in the twelfth paragraph of plaintiff's petition, and further avers, that if the averments of fact contained in the same were true, petitioner expressly denies that the legal effect thereof was to furnish a ground for the forfeiture of its charter.

Petitioner further shows, that it denies every allegation of fact contained in the said petition which might not be included in or covered by the special denials hereinbefore named, the said special denials not being intended as admissions of any averment of fact in the petition contained which is not denied specially, but, on the contrary, demands that plaintiff be required in each instance to furnish strict proof of its allegation,

if that or any other proof can be made by plaintiff, and in any event, it denies and puts at issue all conclusions of law which the plaintiff draws from the facts stated in its petition, or from any other fact which may be proved by evidence on the trial hereof.

Petitioner further shows, that by the said act No. 56 of 1884, particularly the preamble, and sections one, four and five of the same, the state has fully and unequivocally recognized the corporate existence of said company, and constitutes a waiver by the state of all causes upon which the forfeiture of the charter of the said company could be grounded, and if any such ever existed, which is denied, the same by said act, have been condoned and renounced by the State.

Petitioner adopts, in its own behalf, and makes a part of this petition, to the same extent as though the same were incorporated herein, all the grounds and defenses set up by the said company herein, in resistance to the demand of plaintiff.

Wherefore, petitioner prays, that this petition of intervention be filed, and both plaintiff and defendant be duly cited to answer the same, in accordance with law, and after due proceedings, there be judgment rejecting plaintiff's demand, and dismissing its suit, and for costs, and for general relief.

BRANCH K. MILLER,
Attorney for Petitioner.

Service Accepted, Citation Waived, April 5, 1899.

M. J. CUNNINGHAM,
Attorney General, for Plaintiff.

J. R. BECKWITH,
Attorney for N. O. Water Works Co., Defendant.

The State of Louisiana, Civil District Court for the Parish of Orleans.

Division E.

STATE OF LOUISIANA VERSUS N. O. WATER WORKS CO.

No. 58,345.

PEREMPTORY EXCEPTION.

(Prescription.)

And now comes the defendant herein, the New Orleans Water Works Company, through its undersigned attorneys, and for peremptory exception to said plaintiff's action and demand herein, pleads the statutory prescription of one, two, three, five and ten years, acquired, effected and accrued prior to the time when the existing Constitution had the force and effect of law, and prays that this exception be maintained and plaintiff's demand and action adjudged against and dismissed with costs.

J. R. BECKWITH,
FARRAR, JONAS, KRUTTSCHNITT & GURLEY,
E. HOWARD M'CALEB,
Attorneys for Defendant, N. O. Water Works Co.

STATE OF LOUISIANA VERSUS N. O. WATER WORKS CO.

Civil District Court, Division E.

No. 58,345.

Now into court comes the City of New Orleans, intervenor herein, and expressly reserving the benefit of the exception heretofore filed by her to the intervention of the Board of Liqui-

dation of the City Debt herein and in no way waiving same, same is overruled, this intervenor files this supplemental and amended answer to said intervention—and, reiterating her denial all and singular, of the allegations of the intervention of the Board of Liquidation of the City Debt.

Further answering, this intervenor, the City of New Orleans, avers that the said Board of Liquidation has no interest whatever in the thirty-nine hundred and twenty-seven shares of the capital stock of the New Orleans Water Works Company, now standing on the books of the company in the name of said intervenor; but this intervenor avers that on the contrary the said stock was transferred to and placed in the hands of the said Board of Liquidation as a pledge to secure certain debts of the City of New Orleans, existing at the time that the said pledge and delivery were made; and this intervenor avers that all the debts for which the said pledge was made have been paid in full and that the said Board of Liquidation holds in its hands cash and dividends accruing from said stock and from other sources amply sufficient to pay any debts of the City of New Orleans, contracted prior to the transfer of the thirty-nine hundred and twenty-seven shares of the stock named herein.

And intervenor, the City of New Orleans, further avers that it is the duty of the said Board of Liquidation to turn over and return to your intervenors all said stock and dividends accrued thereon, save and except such as may have been used to provide for any debts contracted by the City of New Orleans prior to the adoption of Act 110 of 1890, not provided for by said act.

Wherefore, intervenors pray that the intervention of the

Board of Liquidation herein be dismissed at the cost of said board, and further that this intervenor, the Citiy of New Orleans, be adjudged and decreed the owner of the thirty-nine hundred and twenty-seven shares of the capital stock of the New Orleans Water Works Company, aforesaid, and that the said board be declared without interest in this suit, and that the demands of the said board be rejected and its intervention dismissed at its cost.

And for general relief.

JAMES J. M'LOUGHLIN,
Assistant City Attorney.

ORDER.

Let the foregoing supplemental and amended answer be filed.

New Orleans, January 18, 1900.

GEO. H. THEARD, Judge.

Civil District Court For the Parish of Orleans.

Division E.

No. 58,345.

THE STATE OF LOUISIANA VERSUS THE N. O. WATER WORKS COMPANY.

The City of New Orleans Intervening.

ANSWER OF THE NEW ORLEANS WATER WORKS COMPANY TO THE INTERVENTION OF THE CITY OF NEW ORLEANS AS ALLOWED BY THE COURT.

And now comes the said defendant, the New Orleans Water Works Company, by its undersigned attorneys, and in nowise

waiving or abandoning each or any of its several exceptions or pleas to the said intervention of the city of New Orleans herein as the same are now of record herein, but in allthings and at all times insisting thereon and maintaining that the same are well taken and sufficient in law, by reason of the adverse judgment of the court thereon, makes further answer and defense herein against the said intervention of the city of New Orleans herein and repeats and reiterates each and all of its said several exceptions and pleas hereinbefore pleaded herin against the said city of New Orleans.

And defendant further saith that it is advised that it is the contention and claim of the city of New Orleans that although under the laws of the state of Louisiana governing legal remedies and procedure in the courts of the state for the protection and enforcement of contracts as the same existed in 1877 and 1878, when this defendant entered into its charter contract with the state of Louisiana and its contract of purchase of said water works property from the city of New Orleans, the said city could not lawfully intervene in this action in manner and form as it has now been permitted to do, viz.: in a cause where it could not lawfully be permitted to stand as the plaintiff in the action alleging the matters set forth in the petition of the state herein, nor have he relief demanded or sought for by the state herein, yet now claims to have acquired such right and power to act as a plaintiff in this action with the right to ignore and disregard all operative estoppels, as well as its own solemn warranty covenants, and that such extraordinary power is granted and conferred on the city and on the courts by the effect of the provisions of an act or resolution of the legislature of the state as Act. No. 150 of the acts of 1898, averring that

said Act 150 of the acts of 1898, *quoad*, this cause and the parties thereto repealed, suspended or subverted all prior legislation and legislative restraints and restrictions in that respect and behalf in existence and operative as a part of the law of contracts in the state when the charter contract between the state and this defendant was made, and when it entered into contract relations with the city of New Orleans by the purchase of said water works property.

This defendant at all times insisting that said Act. No. 150, of the acts of 1898, can not be lawfully so construed as matter of law, yet if the court shall and does so construe said Act 150 of the acts of 1898, then this defendant specially insists and pleads that the said Act No. 150 of acts of 1898, so construed is in all things null and void for repugnance to the Constitution of the United States, particularly to section 10, of article 1 thereof, and to the fourteenth amendment of the Federal Constitution, as well as for repugnance to the existing constitution of this state as impairing the faith of contracts and the guarprocess of law, and this defendant so pleads herein.

antee of the equal protection of the law to all inhabitants and citizens of the State, and of the United States, as well as due vention of the city of New Orleans herin, adopts and pleads

And this defendant further answering as to the said interall and singular all of the pleas, exceptions, denials and matters contained and set up and pleaded in its said answer to the petition of the State of Louisiana, as its said answer is now of record in this cause the same in all respects as if the same was written in this answer to said intervention *in extenso*.

And further saith that if there is any matter or thing in the said petition of the State of Louisiana adopted by the said in-

tervenor herein that is not in said answer denied, avoided or put at issue in said answer so by this deendant adopted, this defendant saith that the same are in all things false and untrue as averred in said petition, and takes full issue of fact thereon with the said city of New Orleans.

And further averring herein defendant saith that the city of New Orleans at all times since this defendant entered into the said contract with the said city for the purchase of the said water works property, and purchased the same, has acted in bad faith toward this defendant and has constantly and continuously evaded, disregarded and avoided its obligations as the vendor of said property and has at all times been guilty of the breach of warranty of the title conveyed to this defendant by the city as the same is imposed on the city by law and its several covenants of warranty written in said contract of sale to this defendant, while this defendant has in all things fully complied with all of the obligations in its contract with the city of New Orleans to be observed and kept on its part.

This defendant as to the said intervenor, the city of New Orleans, not waiving any other of its said pleas and exceptions herein, and in its answer to the petition of the State of Louisiana adopted herein, pleaded pleads prescription of one, two, three, five and ten years under the laws of Louisiana against all of the matters set forth in the said petition of the State of Louisiana herein as adopted by the city of New Orleans in its intervention herein as peremptory exception thereto.

Defendant prays judgment against the city of New Orleans and its said intervention herein with costs.

J. R. BECKWITH,
E. HOWARD M'CALEB,
Attorneys for Defendants, the N. O. Water Works Co.

Civil District Court for the Parish of Orleans, Division E.

STATE OF LOUISIANA VERSUS N. O. WATER WORKS CO.

No. 58,345.

Now into court comes the City of New Orleans, intervenor herein, and for answer to the intervention of the Board of Liquidation herein, pleads that said board is without cause of action and has no interest or right entitling it to intervene in this proceeding or to stand in judgment herein and, if the same is overruled, expressly reserving the same, then and then only, the city of New Orleans denies all and singular the allegations of the intervention of said Board of Liquidation filed herein.

Wherefore, intervenor, the city of New Orleans, prays that the intervention of the Board of Liquidation herein be dismissed and their demands rejected at the cost of said board, and for general relief.

JAMES J. M'LOUGHLIN,
Assistant City Attorney.

New Orleans, Oct. 23, 1899.

Civil District Court for the Parish of Orleans, Division E.

STATE OF LOUISIANA VERSUS N. O. WATER WORKS CO.

No. 58,345.

ANSWER.

And now comes the said defendant, the New Orleans Water Works Company, by its undersigned attorneys, and saving and reserving to itself the benefit of all exceptions heretofore pleaded herein and in no manner waiving the same, for answer to said plaintiff's petition herein, as the same now stands of record herein, saith that it is true that this defendant is a duly created and existing corporation, and that it was created and exists by the force, effect and virtue of acts of the legislature of the State of Louisiana, No. 33, of the acts of the extra session thereof held in 1877, as amended by Act No. 43 of the acts of the legislature adopted in 1878, referred to in plaintiff's petition, but that it is not true that the character, object, purpose and intent of said legislation is truly set forth and stated in said petition. That the truth is, that the prime, main and principal object, purpose and intent of said legislation was not to provide the city of New Orleans with water works, or an installation and works for pumping and providing that city with a public water supply, because, for a period of more than forty years prior to the date of said legislation the city of New Orleans had water works for the public supply of water and for municipal and other purposes, an installation that had been accepted, taken and considered in all things complete and ade-

quate therefor, by both the state and city authorities, as will be hereinafter more fully set forth in its history and particulars. Nor is it true that it was the prime and principal object, motive or intent of the legislature in the adoption of said legislation to provide for the enlargement, improvement or expansion of said then existing water works, at that time owned and operated by the city as full owner thereof, having and possessing full power and authority to enlarge, expand and improve the same, and supply and provide against any inadequacy thereof without the necessity of any enabling action by the state.

That by virtue and authority of the provisions of an act of the legislature, approved April 1st, 1883, the late Commercial Bank of New Orleans was incorporated with authority, and charged with the duty of providing, a water works plant and system for the city of New Orleans, and immediately compelled with that grant and duty by constructing water works and operating the same. That by the terms of said act of April 1st, 1833, the city was permitted to subscribe to the capital stock of said Commercial Bank of New Orleans to the extent of five thousand shares and to pay its subscription in the bonds of the city of New Orleans, bearing five per cent. interest per annum, redeemable in forty years. The city did subscribe for and take five thousand shares of said stock and in payment therefor made and delivered to the said Commercial Bank its bonds for the full amount of five hundred thousand dollars, said bonds bearing interest at the rate of five per cent. per annum, redeemable in forty years from the date thereof.

That by the terms and conditions of said act of 1833, the city by virtue of its ownership of said five thousand shares of stock, became entitled to appoint two members of the board of

directors of said bank, and it was also further enacted therein that, if at the expiration of thirty-five years the city desired to purchase said water works, the bank was compelled to sell the same to the city for a price to be ascertained by an arbitration provided for in said act. The price to be paid by the city in its municipal bonds, bearing interest at the rate of five per cent. per annum, redeemable in not less than ten nor more than thirty years. That at the expiration of said period of thirty-five years the city elected to purchase the water works, arbitration was had and the value and price of the property fixed at two million dollars.

The city at that time being a shareholder in the capital stock of the Commercial Bank to the extent of five hundred thousand dollars, as above set forth, credit to that amount was allowed the city on the price of said property as established by arbitration. The city being also as a shareholder interested in the cash assets of said Commercial Bank, constituting the sinking fund held by the Commercial Bank, as provided for in the twenty-third section of said act of 1833, amounting to the total sum of one hundred and six thousand and six hundred dollars, as the city's share thereof, making, together with said five hundred thousand dollars, on account of stock held by the city, the sum of six hundred and six thousand and six hundred dollars for which the city was entitled to credit on the price of said water works as so fixed by arbitration, leaving the balance to be paid by the city to said Commercial Bank, one million, three hundred and ninety-three thousand and four hundred dollars, to be paid in city bonds authorized by said act of 1833. Said price having been so established and fixed by the parties, the Commercial Bank of New Orleans, by notarial act of sale,

passed before Andrew Hero, Jr., a notary public, in and for the parish of Orleans, on the 19th day of January, 1869, sold and transferred all of said property, together with all rights, franchises and monopolies connected therewith, to the city of New Orleans. The city, as the price so due the Commercial Bank therefor, making and delivering to the said vendor its municipal bonds bearing five per cent. interest, maturing in thirty years from the date thereof, to the amount of one million, ninety-three thousand and four hundred dollars, as more fully and at large appears by a copy of said notarial act filed with this answer and made part hereof and marked "Answer, Exhibit A," to which this defendant at all times refers for certainty.

That from the date of said purchase, on the 19th of January, 1869, until the 9th of April, 1878, the city of New Orleans was sole owner of water works in the city, with full power to enlarge and improve the plant if found not adequate to provide the requisite quantity or quality of water to meet the demand of the city or its inhabitants for all purposes; but deeming the water works adequate in all respects, the city did not during its ownership increase or improve the efficiency or capacity thereof, but rather diminished the same, by allowing the plant and works to become lessened in capacity by decay and dilapidation.

That shortly after the purchase of said property by the city of New Orleans, the five hundred thousand dollars in municipal bonds issued to the Commercial Bank, in payment for its stock subscription to five thousand shares of the capital stock of the bank at the time of its organization in 1833, became due and payable, and were by the city allowed to become dishonored

by non-payment, only one hundred and eleven thousand five hundred dollars in amount thereof having been redeemed by the city in any form or by any means prior to the 9th day of April, 1878. The remainder of said bonds being outstanding, dishonored and unpaid in the hands of *bona fide* holders. At the same time the current obligations of the city matured and constituting its floating debt, amounting to several million dollars, were also outstanding in the hands of its creditors unpaid, the holders thereof clamoring for pay in vain, the city being without revenue or resources adequate to meet and pay the same or its current expenditures involved in the administration of municipal government.

The financial condition of the city being in the condition above set forth, the state legislature attempted to rescue the city in part from this condition of practical bankruptcy by various devices, one being the Premium Bond device and scheme, another was to sell or exchange the city asset, consisting of its public water works for money or in exchange for the matured obligations of the city to some purchaser who would take the property with such added franchises and rights as would apparently make the property valuable in the hands of such purchaser.

To accomplish this end the state legislature, in order to obtain a possible purchaser, was compelled to provide for the creation of a corporation to effect sufficient aggregation of capital necessary to purchase the water works at the price for which the state offered the same for sale, to-wit, two million dollars, and at its extra session in 1877 adopted said Act No. 33 of the acts of that session, referred to in the petition herein, and tendered said water works property and rights for sale under the

terms and conditions of that act; but the terms of said act were so burdensome, the *ex-officio* power of direction vested in the representatives of the city on the board of directors by said act was so great, when added to the city's voting capacity on the stock that it might hold, and the other obligations, features and conditions of the act were so onerous that no persons could be found willing to avail themselves of the act and create the corporation provided for therein. The state having become satisfied that none would avail themselves of said Act No. 33, adopted at the next session of the legislature the amendatory Act No. 43, of the acts of 1878, and again offered the said property for sale, together with the rights, privileges, franchises and exemption conferred in said legislation as amended. This defendant at all times refers to the said acts of the legislature for certainty and makes the same a part of this answer.

When said Act No. 33, of extra session of 1877, had been amended, as aforesaid, by the act of 1878, persons sufficient in number and amount, of the holders of the city's obligations described in said legislation, were found, who were willing to avail themselves of the offer so made in said legislation, and organize the corporation provided for to purchase the property and rights so offered for sale by the state; and having subscribed stock to the extent of five hundred thousand dollars, and having also surrendered to the city of New Orleans, city obligations of the character named in said legislation to the amount of five hundred thousand dollars, par value thereof, to be cancelled and held by the city, as provided in said Act No. 33, extra session 1877, and, after the notice required by said act, met together prior to the 9th day of April, 1878, and

in due form organized the corporation provided for and in all things became a corporation as the New Orleans Water Works Company, defendant herein, and immediately, as required by said legislation, made and issued in due form and delivered to the city of New Orleans full certificates of ownership of the entire twenty thousand shares of stock constituting the entire capital stock of the defendant corporation, conferring the same upon the city of New Orleans in full and complete ownership thereof, not subject to any assessment or demand of the corporation thereon.

The defendant never received into its treasury one dollar from the amount of its capital stock, the city owning and holding every share thereof, as the stipulated purchase price of its entire water works plant and property, including franchises and rights granted by the state and sold with the balance of the property, rights and franchises so offered for sale by the state, amongst which property so sold to, and purchased by, this defendant for a valuable consideration, was the valuable and indispensable franchise to be a corporation, a right and property not servable in law from the balance of other property included in said sale to this defendant.

That on the 9th day of April, 1878, that there might be authentic evidence of said purchase and sale, the city of New Orleans, as directed in said legislation, by a notarial act passed before Gustave Le Gardeur, Jr., at the time a notary public, in and for the parish of Orleans, in due form, sold and transferred to this defendant all of said property, rights, servitudes, privileges and franchises connected with said water works and owned by the city in connection therewith, acquired from said Commercial Bank of New Orleans, or from any other source,

as well as all the rights, franchises, exclusive privileges and immunities created and named in said Act No. 33, of the acts of extra session of 1877, and Act 43, of the acts of 1878, as well as all of the rights, monopolies and franchises granted to the Commercial Bank under and by the provisions of the said act, approved April 1st, 1833, incorporating the said Commercial Bank of New Orleans, that had been assigned and come to the city under the terms of its purchase of the water works from the Commercial Bank and by the terms and covenants contained in said notarial act of transfer of the 19th of January, 1869, so passed before Andrew Hero, Jr., notary, hereinbefore made part of this answer marked "Answer, Exhibit A," as will more fully and at large appear by the attested copy of said act of sale, before said notary public, Gustave Le Gardeur, Jr., made a part hereof, marked "Answer, Exhibit B," to which this defendant at all times refers for certainty.

That there is no holder of a share of the capital stock of the defendant corporation except the city of New Orleans itself that does not hold his shares of said stock by title traceable through mesne assignment to the city of New Orleans, the original holder and owner of the entire twenty-thousand shares of stock authorized by Act No. 33, of extra session, 1877, and that no other shares were ever issued or have ever been in existence.

The city of New Orleans has sold or exchanged in extinguishment of city obligations all of said twenty thousand shares of stock excepting thirty-nine hundred and twenty-seven shares thereof, that are as yet not disposed of by sale or exchange for city indebtedness. The last mentioned shares were held in the name of the city itself as owner until, in compliance with a

judgment of the Civil District Court for the parish of Orleans, affirmed by the judgment of the Supreme Court of the state, the said shares of stock so standing in the name of the city, were transferred to the Board of Liquidation of the City Debt, and have since said transfer been held by that Board for the city as an asset of the city for the extinguishment of its debts, subject to the trust imposed thereon by said Act No. 33, extra session, 1877, and all earnings and dividends thereon have since been paid to the city through said Board of Liquidation.

And further answering, defendant saith, that by the terms of said legislation the State of Louisiana, being well aware that the entire capital stock of the New Orleans Water Works Company was to be given to the city of New Orleans, as provided in said Act 33, extra session, 1877, and from which this defendant would not receive a dollar in funds in its treasury to enable the corporation to carry out the obligations imposed upon it, and in order that the funds might be obtained to accomplish that purpose, in section 9 of the said act, conferred power on defendant to borrow money for the purposes therein stated, and with the consent of the city council secure the payment of bonds issued for that purpose by a mortgage of all the property and franchises of the company, including its "*franchise to be a corporation*," specially therein named, as subject to hypothecation, providing the manner in which such mortgage shall be recorded and declaring that such mortgage shall be and continue a valid and subsisting mortgage until the payment of the debt so secured without re-recordation.

That this defendant has twice availed itself of this right and power to issue its bonds, secured by mortgage of said property, franchises and rights, after having, in due form, first obtained

the permission of the council of the city of New Orleans so to do.

That on or about the 1st day of April, 1879, defendant, by an act before James Fahey, then a notary public, in and for the parish of Orleans, in due form of law made and executed an act of mortgage to secure its bonds to the amount of five hundred thousand dollars, issued in accordance with the provisions of said Act No. 33, extra session, 1877, for the purposes therein stated. That of the bonds so secured, bonds to the amount of three hundred and ninety-five thousand dollars have been issued and the money therefor received by defendant, all of which, except as to matured interest coupons, are not yet due and payable and are held and owned by third persons, *bona fide* holders, and are in form transferable by delivery, and that amongst the other property so mortgaged to secure the payment of said bonds, the *"franchise to be a corporation"* is specially designated, descriped and hypothecated as security for the payment of said bonds.

That afterwards, by another act of mortgage, in due form, passed before C. T. Soniat, a notary public, in and for the parish of Orleans, on or about the 22d day of December, 1892, this defendant, with like consent of the city council, and for like purposes, provided for in said Act No. 33, extra session, 1877, made and executed another, a junior mortgage, to secure a loan of two hundred and fifty thousand dollars, represented by bonds of the defendant, due in twenty-five years transferable by delivery, and except as to matured interest coupons are all as yet unmatured and in the hands of third holders in good faith, all having been issued and the money therefor received by defendant. That this mortgage is a sec-

ond and junior mortgage, mortgaging and hypothecating all of the property of defendant, including the "*franchise to be a corporation*," that being therein specially named and mortgaged as authorized by said Act No. 33 to secure the payment of said bonds and interest.

That both of said mortgages are duly recorded in the proper office of record of such mortgages and all the world has notice thereof, whereby the holders of both said series of bonds under said mortgages have property and right in said grant, so made by the state of said "*franchise to be a corporation*" by this defendant so hypothecated to them in good faith, and they cannot lawfully be divested thereof, or their property therein injured or impaired in value in this action, or in any suit or action in court to which the said holders are not parties thereto, and given their day in court, and this defendant so pleads herein as one defense against plaintiff's action and demand, and that said holders of said bonds are indispensable parties to this action; which by the prayer therein seeks to destroy said franchise to be a corporation so granted to and owned by this defendant and so hypothecated, and that said plaintiff is acting in bad faith and contrary to the constitution of the State of Louisiana and the constitution of the United States in so assailing said franchise to be a corporation in manner and form as the same is assailed in this action, particularly the fourteenth amendment of the Constitution of the United States, prohibiting any state from depriving any person of life, liberty or property without due process of law, or from denying any person within its jurisdiction equal protection of its laws, and this defendant so pleads said constitutional guarantees herein as a right conferred by said Constitution of the United States.

And further answering, defendant saith that it has heretofore in this answer set forth and shown to the court in detail the history, acts and matters connected with the creation and existence of the defendant corporation and the motives, intents and purposes of the legislature of the state in authorizing and creating the defendant corporation; that the court may be fully advised thereof, and having so done now pleads and avers and insists to the court that by reason of the premises and of the law, the grant of corporate life to this defendant was not, as is usually the case in grants of corporate life, for the purpose and in consideration only of the establishment of public works or improvements of a public character, that is to say, where the only consideration passing to the state for the grant of corporate life is some supposed increased general public benefit resulting from the construction and installation of public works, as in the case of ferries, bridges, railways, etc., but, on the contrary therof, in the case of the defendant corporation the contract and agreement between the state and this defendant was and is an unquestionable contract of bargain and sale of all the property, rights and franchises named in Act No. 33, extra session of 1877, as amended by said Act No. 43, of 1878, for an exact price fixed by the state in its offer of the said property for sale and accepted and paid by this defendant in a bargaining in which the state was not acting alone in its character of sovereign, but as a merchant and trader in commerce, and that in the bargaining and sale of said property and franchises the state must in law and by the courts be considered as a trader engaged in driving a hard commercial bargain in its own interest and on its own terms for its own benefit and profit.

That it was not the real motive or intent of the state in thus

bargaining to benefit the inhabitants of New Orleans by providing for them a water works system and plant, for they had for years before that time possessed a public water supply, water works and system. Nor was it the intent of the state in thus bargaining to provide authority to enlarge and improve the then existing water works of New Orleans, for the city, the then owner thereof, had full power to extend, enlarge and improve its water works at will without resort to the legislature for authority. If the complaint was that the city possessed insufficent funds for that purpose, a simple act allowing the city to specially mortgage its water works property would have provided funds for that purpose, in addition to the money arising from the revenue of the water works or from other revenue sources. That such was not the case is further demonstrated by the enactment contained in the fifth section of said amendatory Act No. 43, of 1878, that section being declaratory of the legislative intent in adopting section thirteen of Act No. 33, extra session, 1877, which is as follows:

"Sec. 5. Be it further enacted, etc., that the full, complete and adequate supply of water, referred to in section thirteen (13) of said Act No. 33, shall be so construed as to require a supply of water at the height of not less than fifteen (15) feet from the ground wherever the pipes of the water works now exist."

This defendant avers that the true and actual legislative intent in said Act. No. 33, of extra session of 1877, and Act No. 43, of 1878, was the legislative purpose to sell the property, real, personal and mixed, and all the added rights and franchises contained in said legislation, including the right and "franchise to be a corporation," created in said legislation, as

an inseparable entirety and mass, in order to obtain the means and resources from the purchaser thereof to pay or extinguish two million dollars of the public and floating debt of the city of New Orleans. That the "franchise to be a corporation" was a large and extremely valuable part and portion of the property so offered for sale by the state and so sold to this defendant, and for which it paid the bargained consideration and price of two million dollars. And this defendant pleads and avers that said right to be a corporation cannot lawfully be in this action or by any other means segregated from the other property and mass and destroyed, as is sought in this action by the state moving for such segregation and destruction, the same being in fraud and bad faith while it holds and retains the price paid therefor by this defendant.

That said contract of bargain and sale is in all respects the same in law as if it had been made and entered into by and between private citizens and traders, trading in this state, and cannot be assailed or recalled by the state excepting for the same sufficient causes and by the same legal proceedings in the same form as provided by the laws of this state in force at the time when said contract and sale was made, providing for assaults upon and the rescission of like contracts between private citizens or inhabitants of the state, all of said statutes, laws and remedies and procedures in court, as far as the same affect said contract, being in fact and in law a part of said contract between the state and this defendant, must, at all times, be read into said contract.

That said contract was and is protected from all impairment at the hands of the state by the Constitution of the United States, particularly in the first article thereof, section ten, at

all times bearing on the State of Louisiana as a prohibition, while acting or moving, as plaintiff in this action, in impairment of the faith of its own contract, to the same extent as if such impairment had been attempted through and by means of legislation compassing the same effect and result.

That if said joint resolution of the state legislature, referred to in the petition herein, can be or is construed as directing the institution and prosecution of this suit (that is, Concurrent Resolution, being Act No. 150 of the Acts of 1898), or as directing the Attorney General of the state, in name of the state, to institute and prosecute this action, in manner and form, as the same is instituted and prosecuted, for the purpose and with intent to segregate from the mass of the property so sold by the state to this defendant for value its "franchise to be a corporation" for forfeiture and destruction, or, if there exist any other statutes of the state authorizing or directing the Attorney General to that end and purpose, said joint resolution and said statutes are severally repugnant to the Constitution of the United States, particularly to section ten of article one thereof, and this defendant specially pleads the same herein in defense of this action, claiming the protection thereof.

That in and by Act No. 56, of the acts of 1884, made a part of this answer, as if the same was written herein *in extenso*, the State of Louisiana fully recognized this defendant as an existing corporation and in all things recognized the same as having full power to exist free from any cause of forfeiture of its corporate life or lawful grounds for the rescission of said contract, bargain and sale with which its corporate life is indissolubly connected and welded, and neither the city of New Orleans nor the State of Louisiana has, at any time, tendered back to this

defendant the price and consideration that defendant paid for said corporate life and other property, nor the value and cost of any betterment of any of said property by this defendant while in possession thereof, nor have either of them in any way offered or attempted to restore this defendant to its condition as it existed at the time when it so purchased its corporate life and other property as aforesaid, as required by law in the case of rescission of contracts by the law of the state existing and in force at the time when said sale was made, and at all times since that date. Nor has either the state or the city of New Orleans in any manner attempted to put this defendant in default for any alleged non-performance of said contract with the State of Louisiana in any lawful manner or form.

And this defendant, saving and reserving the benefit of all the pleas and exceptions and matters in this answer hereinbefore stated and pleaded, and in no wise waiving the same, but at all times insisting thereon, and proceeding to answer specially and in detail the several allegations and alleged separate grounds of forfeiture in said petition set forth, numbered from one to twelve, inclusive, saith, that as to the allegation that the city council of the city of New Orleans has, by resolution, directed or requested the State of Louisiana through its Attorney General to institute this action, this defendant saith that the city of New Orleans is a shareholder of the capital stock of the defendant company to the extent of thirty-nine hundred and twenty-seven shares; that but for the bad faith, assaults of the city on the property and rights of defendant, said shares would be an asset of the city, worth the full sum of four hundred and thirty-one thousand nine hundred and seventy dollars, in market value, and that all of the great depreciation in market value

of said city stock and asset, and the loss to the city in property, has been the result of the bad faith, attacks and assaults, slanders and libels of the city as a shareholder, having three-sevenths representation of the board of directors of defendant corporation, and also having, by solemn act and contract, warranted the defendant against eviction, destruction of life and the possession of all the franchises, property and all other rights, so sold defendant for two million dollars paid to the city therefor.

That said resolution or ordinance was adopted in bad faith and was and is no warrant or authority for the institution of this action by the Attorney General for and in the name of the state. That if the said legislation of the city of New Orleans is any authority, lawful direction or warrant to the Attorney General of state to institute this action and prosecute the same and can be so held by the courts, then said resolution is repugnant to law, to the constitution of the state and to section 10 of article one of the Constitution of the United States, as impairing the faith of a contract between the defendant and the State of Louisiana, in which the city of New Orleans, an integral part of the state, was chief beneficiary, as well as a party, and bound to observe good faith and fair dealing in respect thereto in its legislation, and this defendant so pleads herein, claiming and demanding the benefit of said guarantee in the Constitution of the United States.

Further answering, this defendant specially denies all and singular the matters and allegations of alleged fact and pretended law in said petition contained, prior to that portion thereof where the same is divided into supposed several and distinct causes of forfeiture, numbered from one to twelve, in-

clusive. wherein this defendant is falsely charged with fraud, wrongs, malfeasance and nonfeasance, and saith the same is false and untrue in all respects and particulars and in all things denies the same.

I.

And further answering, specially and separately, to each and all the said several alleged grounds of forfeiture, as set forth and numbered ONE in said petition, saith, that each and every statement and allegation therein contained is false and untrue and denies the same.

That the truth is, that from the day when this defendant first had corporate life and became the owner of said property, rights and franchises, it has furnished the city of New Orleans and the inhabitants thereof, residing within the area and limits of its mains and pipes, all of the water demanded for consumption, both by the city of New Orleans itself and the said inhabitants, contracting for supply thereof to the full extent demanded of defendant and with greater pressure and head and with more rapid delivery than was ever demanded or contracted for by the terms of its contract with the state or city, and than was the case when said water works was owned and operated by the said Commercial Bank of New Orleans, or while the city of New Orleans was the owner thereof, the period of both of said ownerships covering a term of nearly half a century prior to the date when this defendant became the owner thereof.

That the truth also is that the water so supplied by this defendant has been and is taken from the Mississippi river, at the exact point and locality where it was contemplated in said

Act No. 33, extra session, 1877, such water should be taken and at the same exact and identical place and location in said river where the public water supply was had and taken by the said Commercial Bank of New Orleans, during the thirty-five years of its ownership, as well as during the succeeding nine years when the city itself owned said works and provided public water supply, continuing up to the date when this defendant became the owner of said water works in 1878.

That the character of the water so taken from said source has always been and still is the same in quality and condition as the water in the river from which it at all times has been and still is taken, and has been so taken at all times since the year 1833, and has been and is taken by defendant from the exact source and is of the exact quality required and provided for in said Act No. 33, of extra session, 1877, and by the contract of this defendant with the state, being the source of supply and the quality of water that the city and inhabitants have deemed proper and adequate at all times since 1833, as well as being the particularly named source of supply pointed out and designated by the state legislature in the thirteenth section of said Act No. 33, extra session, 1877, referred to in plaintiff's petition.

II.

And further answering, specially said second sub-division, or alleged ground of forfeiture set forth in said petition, and numbered TWO, this defendant also saith that each and every allegation therein contained is false and untrue and denies the same as therein set forth and charged against this defendant.

And defendant saith that the truth is as set forth in its above-

pleaded answer to the said sub-division and alleged cause of forfeiture, and again avers that said water supplied by this defendant has been and is of the same quality and from the same source as has been considered and deemed as "adequate to extinguish fires, to wash the yards, alleys and streets, and to supply the inhabitants with water for bathing and domsetic purposes," and as "fit for drinking and cooking," and as the best and only available adequate source of public water supply for the city of New Orleans for said purposes by any system of public water works since 1833, and even earlier than that date, and of the quality and from the source that this defendant contracted with the state to supply water.

That this defendant never contracted with either the state or the city of New Orleans to furnish with its water works any supply of clarified or filtered water to the city or to its inhabitants. The state, at the date when said acts of 1877 and 1878 were adopted, and at all time since that date, has so construed the contract of this defendant with the state, and has so asserted through its legislation and general assembly.

That amongst the numberless acts of bad faith towards this defendant by the city, in open breach of its written contract of sale of said property to this defendant in said legislative acts so ordered to be made, and in express and open violation of the warranty therein covenanted by the city and after it had been in possession and enjoyment of the entire purchase price thereof paid to the city therefor by this defendant, it assailed this defendant in the courts of the state, asserting the invalidity of section 11 of Act No. 33, of 1877 (extra session), on the allegation that that section was null for repugnance to the existing state constitution, in that the exemption of the prop

erty of defendant from city and parish taxation made the sole consideration for free supply of water to the city itself for public purposes enumerated in that section was prohibited by the state constitution, and pressed that litigation to a final decree in the Supreme Court of the state, that court declaring such exemption void for repugnance to the constitution. Whereupon the city assessed and demanded municipal taxes from defendant, thus eliminating the sole and only consideration for such free public water supply and destroying all legal right to demand the same from this defendant, as it was advised and believed, whereupon, the state legislature, taking cognizance of this condition of affairs, acted thereon at its session for 1884, and adopted and promulgated Act No. 56, of 1884, made a part of this answer, and by said legislation not only recognized the existence of the defendant corporation, as hereinbefore pleaded, but also gave conclusive evidence of the legislative construction of Act No. 33, of extra session, 1877, concerning the source from which defendant had contracted to furnish water, as well as the quality of water to be furnished as water supply to the city of New Orleans, enacting, amongst other things, in the fourth section thereof, as follows, to-wit:

"Sec. 4. Be it further enacted, etc., That to secure the inhabitants of New Orleans and to the use of the city a supply of filtered or clear water, the city of New Orleans be and is hereby empowered to contract with the said company, and determine upon terms and conditions, and fix a price for obtaining from said company such supply of clear or filtered water."

This defendant avers that this action of the legislature foreclosed all dispute and question of the real legislative intention in adopting said Act No. 33, extra session, 1877, as to the

source and quality of the water supply to the city of New Orleans, called for by defendant's contract with the state in accepting said act as amended, and also was and is in law a declaration that at that time there existed no reason or cause for the forfeiture or recall of any rights granted to, and vested in the defendant under said legislation of 1877 and 1878, as hereinbefore pleaded.

That said Act No. 56, of 1884, and section 4 thereof, has been in full force since the day of its promulgation, and yet the city of New Orleans has never attempted to avail itself thereof, nor has it taken any steps or made any proposal to defendant to contract for a supply of clear and filtered water, or offered to make any contribution or incur any necessary expense involved in any attempt to obtain that character of public water supply for the city itself or for consumers of water.

That this defendant becoming satisfied that the city of New Orleans would not avail itself of the provisions of said section four of said Act No. 56, and that it could expect no aid from the city in that behalf, attempted to secure for the city a supply of filtered water at its own expense, although not required by law so to do, and employed engineers and experts in the art, and negotiated with all persons and corporations professing to be able to accomplish that end, and after incurring large expense in said search and negotiation, made a contract with a corporation professing to have the means, inventions and apparatus adequate to filter the water of the Mississippi river in sufficient quantity to supply the water demanded for public water supply in the city, to install their filtering devices and apparatus in connection with the water works of defendant, as will more fully and at large and in detail appear by the

record of the case of The National Water Purifying Company vs. The New Orleans Water Works Company, No. 12,036 of the docket of the Supreme Court of the state, being an appeal from the judgment of the Civil District Court of the parish of Orleans in the same case, being No. 44,548 on the docket of that court, to which record this defendant at all times refers for the details of said contract, and the decreed failure of the National Water Purifping Company to accomplish the results contracted for. That in order to put the pumping machinery of the water works in proper condition and make other changes in the water works plant necessary to make such attempt, and incorporate and install said filtering device and to make tests of said device and machinery for filtering, this defendant incurred large expenses amounting to forty thousand dollars, all of which was paid from its own moneys, to which the city of New Orleans never contributed anything. That after several repeated expensive trials and tests of said filtering device, the result was an utter failure, as adjudged by the courts in the above stated cause. That the city of New Orleans has, at no time since said unsuccessful attempt, taken any steps to negotiate for any other attempt, or in any other way to avail itself of said section four of said Act No. 56, of the acts of 1884, nor has it proposed to defendant any plan of co-operation with defendant under said section four. And this defendant knows of no means by which a supply of clear or filtered water can be obtained for the public supply of the city of New Orleans, as the state of the art of clarifying and filtering water now stands and exists, although it has made most diligent inquiry and search in that behalf.

III.

And further answering, specially said THIRD sub-division or alleged ground for forfeiture set forth in said petition, this defendant also saith, that each and every allegation therein contained is false and untrue, and denies the same as therein set forth and charged.

And said defendant saith, that the truth is as hereinbefore set forth, in respect of the said first and second charges and alleged grounds of forfeiture above answered by this defendant. And while now and at all times so denying all and singular the allegations of supposed fact and law in said sub-division set forth, defendant, as peremptory exception thereto, saith, that all and singular the matters charged therein as facts are not sufficient in law to constitute a lawful cause of forfeiture or any other ground of relief prayed for in this action, nor attainable therein by the state, and at all times pleads and insists thereon as a matter of law.

And this defendant further saith,, that the pretended construction and declaration of the legal duties of this defendant and the terms of its contract with the state, as expressed in the thirteenth section of Act No. 33, of extra session of 1877, as amended by Act No. 43, of 1878, as set forth and pleaded by the plaintiff in said sub-division three is false both in law and averred fact. That as the offer of the state stood in said Act No. 33, it was so burdensome in conditions that no one could be found to accept the offer or purchase the property and franchises tendered for sale by the state at the price demanded therefor, and for that reason the state legislature amended and changd its proposition and offer by Act No. 43, of 1878, partic-

ularly as to section thirteen of the act of 1877, especially enacting therein, in section five of said Act No. 43, as follows:

"Sec. 5. Be it further enacted, etc., That the full, complete and adequate supply of water, referred to in section thirteen (13) of said Act No. 33, shall be so construed as to require a supply of water at the height of not less than fifteen (15) feet from the ground wherever the pipes of the water works now exist."

Defendant avers that it has, in all things, complied with all of its obligations in that respect, has increased the area and territory covered by its mains and pipes and has increased the water pressure on its mains and pipes far beyond anything that is or can be lawfully demanded of this defendant under said contract with the state under the provisions of said section thirteen of said Act No. 33, as amended, and has installed more fire plugs, hydrants, and fire wells than required of it by law, and has, at all times, complied with any request of the authorities of the city of New Orleans for the installation of additional hydrants, fire plugs and fire wells in any part of the city where its mains and pipes extend, and has supplied the same with water at high pressure, far exceeding a column of water fifteen feet from the ground, and has, at all times, been willing to comply with any such request of the city of New Orleans. And that if it was true that the supply of water for the extinguishment of fires is, or has been, insufficient within the area covered by the pipes and mains of this defendant, which is specially denied, it has been by the fault of the city of New Orleans, and not by reason of any fault, dereliction or breach of contract by this defendant, in any respect or particular.

IV.

This defendant, answering specially the said FOURTH alleged cause of forfeiture in said petition set forth, therein numbered four, specially denies all and singular each and every allegation therein contained, and denies specially that it has been guilty of any dereliction of duty or committed any breach of the terms and conditions of its contract with the State of Louisiana, and avers that all of said charges and allegations are false and untrue; and, for further answer to said sub-division four, adopts and asserts the matters and exceptions by it set up and averred in its answer to sub-division one, two and three hereinabove pleaded.

V.

This defendant, further answering, specially saith FIFTH alleged cause of forfeiture in said petition set forth, specially denies all and singular each and every allegation therein contained, and saith that the same are each and all false and untrue.

And further saith, the plaintiff has therein falsely stated the legal import and meaning of section fifteen of said Act No. 33, extra session, 1877. That the truth is, that in and by said section fifteen the legislature of the state conferred upon this defendant, through its board of directors, legislative power and authority to establish and fix the rate of water charges for water sold, subject only to the condition that such rates should not be so high as to yield a net profit of more than ten per cent. per annum on the two million dollars of the capital stock of the defendant corporation, and also provided that the rate of

charges for water so fixed should not exceed in amount the rates which the city of New Orleans had a right to charge for a like supply at the time of the adoption of said Act No. 33, extra session, 1877.

That the right to establish such water rates, so granted to defendant, was and is the right to legislate on the subject conferred and expressly delegated by express delegation and contract carring with it all of the legal incidents connected with that power, one of which is the legal presumption of the correct exercise and use thereof by the possessor, not to be overthrown, except by the solemn adjudication of a competent court on an issue duly and properly made and determined in a competent court.

That the board of directors of defendant, consisting of seven members, three of whom have always been officers of the government of the city of New Orleans, representing the city, have, by virtue of the legislative power vested in said board of directors for that purpose, by said Act No. 33, extra session of 1877, established and fixed the rate of charge for water furnished to consumers, and that has been charged by defendant, and the presumption of correct legislation by said board of directors in that behalf attaches thereto and has never been overthrown or adjudicated against in any suit by the city or by the state on an issue as to the legality thereof.

That the rate of charges so established has never yielded or produced ten per cent. profit on the capital stock of the defendant corporation at any time, nor has said rate of charges at any time been in excess of the rate that the city of New Orleans had lawful right to charge and collect at the date of the adoption of Act. No. 33, of extra session of 1877, for a like supply,

with "equal facilities and opportunities for drawing water from its pipes." The truth being that the administration of the public water works, while owned and operated by the city, and at the date of the adoption of said Act No. 33, of extra session of 1877, was so wretched, and the works in such dilapidation, and the management so reckless, careless and incompetent, through the fault of the city, that it was impossible for the city to give and furnish consumers the same quantity of water through the same house and yard fixtures, cocks and valves as this defendant has delivered to the same consumers.

The average pressure on the pipes and mains of the works, while owned and operated by the city, was never in excess of the pressure exerted by a water column of fifteen feet from the ground in vertical heighth, insuring only a very sluggish flow of water not adequate to deliver water above the average ground story of the average building, whereas, since the ownership of the works has been vested in defendant, the water pressure on the pipes and mains has been greatly increased, until it is equal to the pressure of a water column of from sixty to eighty feet in vertical heighth from the ground, allowing water to flow to the upper stories and roof tanks of buildings not erected above the heighth of sixty or eighty feet, without involving the consumer in the expense of pumping the water to all poins above fifteen feet from the ground and delivering a largely increased flow and quantity of water from the same size openings, valves and cocks as were used when the city owned and operated the works, largely increasing the expense involved in, and incident to the increased supply and pressure of water furnished by the defendant without any increased expense or charge to the consumer for such supply and additional pressure.

That, if this was not the case, and it was true, as averred by the plaintiff (which is at all times denied), that the charges and water rates, as fixed by the defendant, have been and are higher than the city could lawfully charge when it sold the works, the fault, if any, is as much the fault of the city of New Orleans as of this defendant, the city of New Orleans not only having participated, through its directors, in the establishment of the rate of charges now complained of, but has, at all times, participated in all dividends and earnings accruing to the defendant corporation from such charges and disposed of in dividends pertaining to the 3927 shares of capital stock of the corporation, owned and held by the city, from the date of the creation of defendant corporation, and has expended the money so received for its own purposes and has never returned of offered to return any part thereof to defendant, as money illegally disbursed in dividends, whereby the city of New Orleans and the State of Louisiana, through said city, stand, and are in law estopped from in any way and for any purpose asserting, either as an alleged cause of forfeiture, or complaint in any form against this defendant, that any unlawful or illegal charge for water has been made or collected and disbursed in dividends by the defendant company, and this defendant so plads herein.

And this defendant further avers that no lawful action or proceeding for the forfeiture of defendant's charter or any of its other property, rights and franchises can be lawfully based on any alleged non-compliance with any of the provisions of said section 15 of Act No. 33, E. S. 1877, at the instance of the state, in this or any other form of proceeding, because said section 15 provides for its own enforcement in the courts by

legal proceedings at the suit of the city of New Orleans, with which duty said city stands charged in that section by the command of the state. That it was to enable the city to perform that duty that three of the executive and administrative officers of the city government are made *ex-officio* directors of the defendant corporation, to participate in all legislation establishing water rates, such representation not to cease even when the city has parted with all of its shares of the capital stock of defendant corporation. That it was for the same reason and purpose that the city was given the right of visitation by the city council, through a committee of five councilmen, for the purpose of determining whether the restrictions imposed by said section 15 have been and are observed by the board of directors of the corporation, as well as whether there has been any overcharge in water rates, or whether there has been any excess of net earnings from water rates over the limit of net earnings fixed in said section fifteen. That said section fifteen provides a special remedy by judicial proceedings for the adjustment of any difference of opinion between the city authorities and defendant, both as to the rate of water charge or concerning any excess of revenues and net profits arising therefrom, or as to the correctness of the legislation of the board of directors of defendant, establishing water rates, by mandamus or other judicial proceedings in the courts.

This defendant avers that by reason of the provisions of said section fifteen of said Act No. 33, E. S., 1877, that section provides for its own enforcement, devolving that duty upon the city of New Orleans, acting through the courts by special judicial proceedings, and that no pretended neglect, mistake or failure of duty prescribed in said section fifteen made by this

defendant, can be made a lawful ground for this action or for forfeiture of any of the rights or property of defendant by the state until after this defendant has had its day in court thereon at the suit of the city of New Orleans, and has unlawfully neglected, failed or refused to comply with any lawful judgment against the corporation therein, if adverse to the decision and legislation of its own board of directors, and this defendant so pleads herein as peremptory exception to said sub-division five.

VI.

And this defendant specially answering, saith SIXTH special separately enumerated pretended cause of forfeiture, in said petition contained, at all times protesting against the confused aggregation of vague, loose and indefinite allegations of supposed law and pretended facts contained therein saith that the same, as pleaded therein, are each and all, in all respects and particulars, false and untrue, and denies the same; and as to the same in addition to said denial of the truth thereof, this defendant pleads and avers all of the matters, pleas and exceptions by defendant hereinbefore pleaded in its answers to said sub-division 1, 2, 3, 4 and 5, adopting the same without repetition.

And further, in this behalf as peremptory exception, pleads that said sub-division SIX does not set forth or disclose any cause of forfeiture sufficient in law to warrant the judgment prayed for, or any other relief in law, even if true as alleged, which this defendant at all times denies.

VII.

Said defendant further answering, specially said sub-division and alleged ground of forfeiture in said petition, numbered SEVEN, denies each, every and all of the allegations therein contained, at all times protesting against the vagueness and indefiniteness thereof, and further saith, that it has, at all times, to the best of its knowledge, in all things, complied with its contract obligations with the State of Louisiana and observed all of the restrictive conditions contained therein, and has violated none of them.

And further saith, that the city of New Orleans, through its representation on the board of directors of defendant, as well as by and through the annual reports of the defendant to the city, and to all other shareholders, has, at all times, participated in the management of defendant's affairs and been cognizant of the condition and management thereof and participated in and received all benefits, earnings and dividends to the extent of the proportion thereof accruing to the thirty-nine hundred and twenty-seven shares, at all times owned and held by the city, constituting, approximately, one-fifth of all the dividends ever declared by defendant, and has never tendered back to defendant any part thereof, but, on the contrary thereof, has expended said dividends for its own purposes as a legitimate part of city revenues, whereby said city of New Orleans is both, by good conscience and in law, estopped from assailing this defendant for any pretended illegality in the declaration or payment of any dividends or for any other reason involved in the management of its affairs, through its board of directors, either directly or through the state in this action, and from fomenting such

attack by the adoption of the resolution of importunity to the Attorney General, harrassing the legislature, employing the City Attorney to reinforce the Attorney General, or by any other devices and schemes whatsoever, and this defendant so pleads herein.

VIII AND X.

And said defendant further answering, specially said sub-divisions EIGHT and TEN in said petition, attempting, as the defendant understands the same, to charge substantially the same alleged grounds of forfeiture, saith, that the said matters alleged in said sub-divisions do not allege or set forth any contract with the State of Louisiana or any pretended violation thereof, that can be made a cause of complaint or forfeiture by the State of Louisiana, nor any part of any obligation contained in defendant's charter, and this defendant so pleads for peremptory exception herein and insists thereon.

And further, defendant saith, that it is true that this defendant on the 3d day of October, 1884, did enter into a mutual written contract with the city of New Orleans, passed by due authority before J. D. Taylor, official notary of the city of New Orleans, at that date, a copy whereof is annexed to this answer and made a part hereof for certainty, marked "Answer, Exhibit C," being a contract containing mutual covenants, entered into for the reasons stated in said contract, and in Act No. 56 of acts of 1884, hereinbefore made a part of this answer.

That said legislation and contract were made necessary by the action of the city of New Orleans in assailing the eleventh section of Act No. 33, E. S., 1887, for alleged unconstitutionality, as in this answer hereinbefore set forth.

That shortly after said contract of October 3, 1884, was entered into, E. Conery, Jr., and others, averring themselves to be taxpayers, instituted an action for the benefit of the city of New Orleans against said city and this defendant, by a petition, charging frauds against both defendants, praying, among other things, that said contract be rescinded as *ultra vires* the powers of the city as the fraudulent result of unlawful conspiracy, and because of alleged repugnance of Act No. 56, of acts of 1884, to the state constitution for various assigned reasons, praying for injunction against both defendants, prohibiting the observance of any terms of said contract; said cause being 15,774 of the docket of the Civil District Court for the parish of Orleans, to the record of which this defendant at all times refers for certainty.

The city appeared therein as defendant, and answering, denied all of the frauds and illegal acts charged against it, and all illegalities charged against the contract and Act 56, of 1884; but between the date of its said answer and the trial of the cause on its merits, the personnel of the city government was changed by an election, and the city changed front in the litigation, and without withdrawing its first answer therein joined the taxpayer plaintiffs, filing another answer, adopting and confessing all of the charges of fraud and other averments of the taxpayers' petition and joined in the prayer thereof for the rescission of the contract and for injunction against itself.

The trial in the lower court resulted in a judgment as prayed for, whereupon this defendant appealed to the Supreme Court of the state, the cause being No. 10,334 on its docket, where said decree was reversed and the petition and demand dismissed.

Both E. Conery, Jr., et al., and the city of New Orleans sued out separate writs of error to the United States Supreme Court, where they were again defeated, said case being reported in 41 An. 910, and in 142 U. S. 79, to which defendant at all times refers for certainty.

That the effect of that judgment was to foreclose all issues, questions and demands therein litigated and render the same *res adjudicata*, both as to the city of New Orleans and the State of Louisiana for the purposes of this action, and this defendant so plads herein.

And defendant avers that it has in all respects fulfilled and observed all of its obligations in said contract, but the city of New Orleans has failed so to do, and is largely indebted to defendant by reason of such default.

Defendant further saith, that the constitution of the state, adopted in 1879, and every article and provision thereof, was adopted subsequent to the charter of this defendant, and that parts thereof, particularly articles 46, 234, 248 and 258, are severally, as to this defendant, repugnant to the constitution of the United States, article 1, section 10, and other provisions of said Federal Constitution, prohibiting any state from impairing the faith of contracts, and this defendant so pleads herein, and saith that, as to this defendant, the same are severally null and void.

That the same is true as to and concerning articles 48, 262 and 276 of the now existing constitution of the state. The same are severally also repugnant to article 1, section 10 of the constitution of the United States, and this defendant so pleads herein, claiming the protection of the Federal constitution in its behalf.

And as to all allegations in said sub-divisions eight and ten, not herein admitted, this defendant denies the same and says the same are false and untrue.

IX.

And further answering, specially said sub-division and alleged cause of forfeiture numbered NINE, said defendant denies each and every allegation therein contained, and saith that the pressure on the mains and pipes maintained by the city in 1877 and 1878 was only that of a column of water of a vertical heighth of fifteen feet from the ground, and that this defendant is not advised of any method of application of power or device by which a pressure of water equal to sixty feet and more from the ground can be obtained and maintained without increased expense and larger expenditure of power and fuel than is involved in creating and maintaining a column of fifteen feet, and will adopt any such scheme and device as soon as it is discovered and available, and for peremptory exception saith, that the allegations in said sub-division nine, do not, if true (which is denied), aver or state any lawful cause of forfeiture against this defendant or warrant any of the relief prayed for in said petition.

XI.

And further answering, specially said sub-division and alleged ground of forfeiture, numbered ELEVEN, which is in words and figures, as follows:

"It, in 1878 or 1879, illegally sold or issued its own stock of the par value of $100.00, at $33.00 per share, where it had no power to issue it at less than $100.00 per share."

This defendant saith, that, as pleaded, this sub-division is so vague and uncertain in meaning that it is unable to determine what is intended to be charged.

That, if it is intended to be charged that at the dates named or at any other time this defendant has made and put out and sold any shares of its capital stock in excess of the twenty thousand shares, authorized by its charter, to be made and delivered to the city of New Orleans, the averment is not only false, but is libellous.

It it was only intended to charge that this defendant, subsequently to the delivery of all its capital stock to the city of New Orleans, as required by its charter, became the owner of some of said shares, in compromise of, or in settlement of any demand of the defendant, from otherwise insolvent debtors, or in any other lawful manner, and has sold the same in the market at market price, said sub-division only avers that the defendant has exercised a lawful right vested by law in all corporations.

That this defendant, during its existence, has never exercised that right but on one occasion, and was then compelled to do so by the wrongs and bad faith of the city of New Orleans. That after the adoption of said Act No. 33, E. S., 1877, and Act No. 43, 1878, and after it was known by the city that the water works was to be transferred and sold to defendant, and that all water supply must thereafter be provided by this defendant, the city of New Orleans made haste to demand of, and receive from consumers pay for water in advance for a period, when it well knew this defendant must supply the water so paid for in advance, and incur all expense therefor, and that the city could not deliver the water so sold with prepay-

ment to the city. The money so unlawfully obtained by the city amounted to twenty-five thousand dollars, which the city took into its bankrupt treasury and disbursed for its own purposes, and was unable or unwilling to return to defendant in cash. That this defendant, in order to avoid total loss of all of said money, agreed to take two hundred and fifty shares of its capital stock owned by the city, in compromise of said demand, at the par value of one hundred dollars per share, and after receiving one dividend thereon of two dollars per share, sold said shares at the market price thereof at the date of sale, realizing with said dividend, only $8250.00, and was compelled to submit to the total loss of the balance of said $25,000.00, so abstracted from its revenues by the said unlawful act of the city. That except, as above stated, said allegations are false and untrue, and defendant pleads, as peremptory exception, that the same, if true (which is at all times denied), are insufficient in law to entitle the plaintiff herein to any relief prayed for in said petition.

XII.

Defendant further specially answering said sub-division, numbered TWELVE, saith, that it denies all and singular all of the allegations therein contained, and pleads as peremptory exception herein that the same, if true (which is at all times denied), are insufficient in law to warrant any forfeiture or relief prayed for by plaintiff in this action.

And said defendant further saith, that if there are any matters or allegations in said petition contained that this defendant has not either admitted or specially denied, the same are false and untrue.

And further, that this answer is made herein, subject to each and all of the pleas and exceptions therein made and pleaded, either to the entire petition and demand, or to each sub-division and separately alleged ground of forfeiture, this defendant in no wise waiving the same or any of them, but at all times insisting thereon and praying that they may be sustained, and also prays judgment against said plaintiff's demand, with all costs that can be by law adjudged against the said plaintiff, and for all general relief.

J. R. BECKWITH,
FARRAR, JONAS, KRUTTSCHNITT & GURLEY,
E. HOWARD M'CALEB,

Attorneys for defendant.

Civil District Court for the Parish of Orleans, Division E.

STATE OF LOUISIANA VERSUS N. O. WATER WORKS CO.

No. 58,345.

Now comes the defendant, through J. R. BECKWITH, FARRAR, JONAS & KRUTTSCHNITT, and E. H. MCCALEB, its attorneys, and for return to the order rendered in this cause on the 15th day of November, 1899, requiring defendant to produce certain books, papers and documents in court on this day, says:

That defendant excepts to said order, and prays that the same be quashed, annulled and set aside, for this, to-wit:

First. That the same was improvidently granted, and granted without compliance with the provisions of article 140 of the Code of Practice of this state, or with any other provision

of the laws of the State of Louisiana; that in and by said laws, the right to the production of such books, papers and documents, called for, is subject to the proviso that their production be requested in writing, and on oath, with a statement, under oath, of the specific facts intended to be established by such books, papers, or other documents, and that no such oath has been made in this cause, nor have the facts expected to be proved, been set forth with the specifications required by law, nor have the books or papers been described with sufficient accuracy to require their production.

Second. That the production of said books and papers will result in the absolute paralysis and cessation of the business of defendant; that the right to the production of books, papers and other documents, in the possession of the adverse party to a cause, is one resting in the sound discretion of the court according to circumstances, and one to receive a reasonable construction, and to be given such construction as will not operate seriously to the detriment of commerce, or to the pecuniary injury of a party; that defendant is, and has, at all times, been ready and willing to give the freest and fullest access to plaintiff to any and all books, papers and documents in its possession; that such documents are, and at all times have been subject to inspection by the public authorities provided by law, and that defendant therefore has no motive or desire to conceal any of the contents of the same, but that defendant has the right, in case any of its books, or documents be used in evidence, to restrict the use of such books and documents to those which may be material to the issues pending before this Honorable Court, and to exercise the election, which it has under the laws of this state, to demand the substitution of certified copies for

originals, which right is entirely denied to it if all of the records of its office, regardless of relevancy, are to be produced and offered in evidence in globo.

Third. That this cause is one for the forfeiture of the charter of defendant, and is one criminal and highly penal in its nature; that in any by article 11 of the Constitution of the State of Louisiana, for the year 1898, it is provided that, "no person shall be compelled to give evidence against himself in a criminal case, or in any proceeding that may subject him to criminal prosecution, except as otherwise provided in this Constitution." And that nowhere in said Constitution is there any exceptional proviso taking away from defendant the protection of said article 11; and that, in and by article 4 of the amendments to the Constitution of the United States, the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures is protected against violation. And that in and by the fifth amendment to the Constitution of the United States it is provided that no person shall be compelled in any criminal case to be a witness against himself.

That the said order of this Honorable Court is violative of both said article of the Constitution of the State of Louisiana, and said articles of the amendments to the Constitution of the United States which are expressly pleaded as causes of nullity of said order.

SUPREME COURT STATE OF LOUISIANA.

No. 13,701.

STATE OF LOUISIANA VS. THE NEW ORLEANS WATER WORKS COMPANY.

Appeal from the Civil District Court, Parish of Orleans.

STATEMENT OF THE CASE.

In 1898, the General Assembly adopted two concurrent resolutions, which, by the approval of the Governor, became Acts Nos. 5 and 150, respectively, of the session of that year. Act No. 5 provides for the appointment of a legislative committee to investigate certain complaints against the New Orleans Water Works Company, and Act No. 150, after referring to the majority and minority reports, which had ben made by the committee so appointd, and after a recital to the effect that said reports involve intricate questions of law and of fact, which it is impossible, for lack of time, for the General Assembly to determine, provides: "That the whole subject matter of said reports, together with the testimony and evidence upon which they are based, be respectfully referred to the Attorney General of the State, for such action in the premises as he may deem proper." Thereupon, in January, 1899, the Attorney General brought this suit, in the name of the State, praying, for the reasons set forth in the petition, that all the franchises of the said Water Works Company be declared forfeited, or, in the alternative, that said company be decreed to have abandoned the monopoly, claimed and enjoyed by it, of furnishing water to the City of New Orleans and its inhabitants.

In the suit thus filed, the City, and the Board of Liquidation of the City debt, intervened, the one, joining in the prayer of the plaintiff, and the other, in that of the defendant. Both interventions were, however, dismissed, by the judge *a quo*, and the Board of Liquidation has taken no appeal. So that, the case with which we are called upon to deal is that between the State, the City, and the defendant Company, upon appeals, taken by the State and City from a judgment rejecting their demands. The charges upon which those demands are predicated are, in substance; that the defendant has not complied with the obligations imposed by its charter with respect to the quality and quantity of water to be furnished; that it has violated certain provisions of said charter concerning the charging of rates for water, the payment of dividends, the sale of its stock, and the borrowing of money; and that it has abused its franchises by unjust discrimination in the rates charged. It is also alleged that the defendant has accepted the benefit of Act No. 56 of 1884, and has, thereby, and in any event, abandoned its monopoly. It is further claimed, in argument, and the question was passed on by the judge *a quo*, that the Act incorporating the defendant is unconstitutional, because of the failure of its title to disclose the granting of said monopoly.

It appears from the record that, in 1833, the Legislature created a corporation called the "Commercial Bank of New Orleans," the main purpose of which, as declared by its charter, though it was also vested with banking privileges, was to supply the City and the people of New Orleans, with "water from the Mississippi river." The capital stock of the corporation was fixed at $3,000,000 (of which the City took $500,000), and the period of its existence at thirty-five years, with a *proviso* to the effect that, at the expiration of its charter, the City

should have the right to purchase the plant, at a valuation to be determined by appraisement, and to pay for the same in bonds The act contemplated that the water to be furnished should be obtained from the Mississippi river, and, in general, that it should be delivered as so obtained, but there was a clause reading, "and the said company shall supply a sufficient quantity of clear, pure and wholesome water for the use of the inhabitants, within the limits aforesaid, at the elevation of fifteen feet, when the same may be required" (Acts of 1833, p. 167, Sec. 38), from which it appears that the obligation was imposed upon the company to free the water of the material usually carried by it in suspension when specially required by consumers. It does not appear, however, that during the thirty-five years of its existence any such requisition was made, or that the company ever furnished any other water, either to the city or its inhabitants, than the water of the river as taken therefrom. In 1868, upon the expiration of its charter, the tangible property of the company, including lands, buildings, machinery, reservoirs, etc., was appraised, for the purposes of the sale to the city, at $2,000,000, which was, probably, twice or three times its value, but, as the price was paid in bonds which were worth much less than *par*, the profit to vendors was not so great as it would, otherwise, have been. The city, moreover, was a stockholder, to the extent of $500,000, and had to her credit, in the hands of the company, $106,400 of dividends which had been, from time to time, declared, and, these two amounts being deducted from the price, she issued her bonds for the balance, amounting to $1,393,600; and, in January, 1869, the property was turned over to her and placed under the control of a Board of Commissioners and a Superintendent, appointed

by, and acting under the authority of, the Mayor and Council. During the City's administration, which lasted from January, 1869, to April, 1878, the propriety of improving the quality of the water was constantly recognized, and various reports and suggestions upon the subject were made, but nothing was accomplished. The works were, however, extended, and, when turned over to the defendant now before the court, in April, 1878, consisted, so far as facilities for distributing the water were concerned, of 63 miles 1794 feet of main pipes, of different dimensions. The question of the tariff of charges was also much considered by the city authorities, and, eventually, with more decisive results than followed upon their deliberations concerning the quality of the water. The Board of Commissioners, apparently, before the works actually came into the possession of the city, had adopted a schedule, which has since been known as the "Hatch" tariff, no doubt, because promulgated over the signature of F. H. Hatch, as president *pro tempore* of said Board, and the charges for water were regulated thereby immediately upon the city's acquisition of the works, and for some time thereafter. As early as February, 1869, a committee, appointed by the Board of Assistant Aldermen to look in the matter, made a report, in which they said: "Your committee on water rates, to whom was referred a resolution directing them to report a table of rates for water rents, have examined the rates now being charged and collected by the Board of Commissioners of the Water Works, and find them entirely too high, and a cause of general complaint among consumers of water. These rates are considerably higher than in many other well regulated cities." This was followed by a statement showing that in Cincinnati and Louisville the

charges for water, furnished in large quantities, and by measurement, was 15 cents per thousand gallons, and in Chicago from 10 to 15 cents per thousand gallons, whilst the rates under the Hatch tariff were from 25 to 40 cents per thousand gallons, for water so furnished. And those rates were quite moderate, as compared to the "flat" rates charged to the small consumers. The Board of Commissioners, it appears, had endeavored, by the introduction of meters, to equalize this taxation, and, in April 1869, General Bragg, the then superintendent of the works, reported upon the subject, in part, as follows, to-wit: "You are presented herewith with an abstract of the measurements of water delivered in the first quarter of this year by meter. * * * The results are so remarkable and extraordinary as to induce me to ask your special attention and scrutiny. They go to show the entire correctness of the principle on which you established your rates, viz, to make them uniform, and, though the result is not yet satisfactory, the small consumer still paying too much in proportion, you have made a long stride in the right direction. A few more applications of the meter, now being made, will enable you to do full justice to all parties. * * * The large distillery, for instance, which received its water last year at two and nine-tenths cents per thousand gallons, now pays twenty cents for the same supply. *Per contra,* the poor laborer, or widow, who paid ninety cents last year, now gets the same allowance for forty cents. The large steam bakery, which paid only eighteen cents, last year, whilst his small neighbor paid eighty, is now put on an equality with the latter, the one being put up and the other put down to a medium. But the greatest contrast is to be found in the larger establishments. In the three large sugar refiner-

ies, one paid four and seven-tenths cents per thousand gallons, another, three and two-tenths cents per thousand gallons, and the third, and largest, one and four-tenths cents per thousand gallons. Here was a discrimination of more than three hundred per cent., against one man in favor of another, engaged in the same commercial business."

"Just 15 per cent. of all the water that is paid for is taken now by five larg consumers. Yet they have, heretofore, paid only 2 per cent. of the revenues. * * * The working of the meters, so far, goes to show that still further reduction may hereafter be made in the water rates, but, in justice, that reduction should inure almost entirely to the small consumer, until he is brought nearer an equality with his more fortunate neighbor." The committee appointed by the council, nevertheless, as we have seen, found the Hatch tariff too high, and they recommended the adoption of a tariff, prepared by them, reducing the charges to about the rates established in the cities mentioned. And such a tariff was adopted by the council, but was vetoed by the Mayor, and was, in March 1870, passed over the Mayor's veto. Very soon after this action had been taken, the President of the Board of Commissioners addressed a communication to the Mayor and Council, in which, referring thereto, he said: "As this tariff is to be put in operation when officially promulgated, the Board of Directors of these works have directed me to call your attention to the serious difficulties which must arise in its operation." He then called attention to the fact that, in December, 1869, a tariff (being the Hatch tariff) had been adopted, for the year 1870, upon the basis of which tariff, all the bills for the ensuing year had been made, and sent out, and that more than one-half of such bills had been

paid; and he asked the following questions concerning the proposed new tariff, viz:

"1. Shall it go into effect immediately? 2. Is it to have any retroactive effect? 3. If retroactive, does it work a change of bills not paid, only, or does it apply to those already paid? 4. As the money collected under the present tariff had already been appropriated by you to pay interest on the Water Works bonds, how can it be refunded?" This communication was submitted to the Board of Aldermen, March 14, 1870, up to which time, it is quite evident, the ordinance establishing the new tariff had not been promulgated. Upon the following day, March 16, 1870, the Governor of the State approved the Act No. 7, of the Extra Session of 1870, establishing a new form of government for the City of New Orleans, the concluding section of which provided that it should take effect from and after its passage. And nothing was thereafter done with the tariff ordinance, the evidence in the record being conclusive to the effect that it was never promulgated. Under the new City charter, the control of the Water Works was vested in an "Administrator of Water Works and Public Buildings," and the record contains the report of the first of the officers so designated, and also of the last. We learn from these reports, and from other evidence in the record, that, during the year 1868 (being the year preceding the acquisition of the Water Works by the City), there were pumped a total of 2,227,000,000 gallons of water, for which there were received $155,023.75, or an average of about 69.6 cents per 1000 gallons. What amount of water was pumped during 1869, the first year under the City's administration and under the Hatch tariff, the record does not show, but the receipts amounted to $143,-

293.00. During the year ending in May, 1871, there were pumped 2,101,015,000 gallons, for which the City received, under the Hatch tariff, $148,064.91, or an average of about 70 cents per thousand gallons. From that time, although the record does not show the quantity of water pumped during the several succeeding years, the falling off in the receipts indicates that the Hatch tariff was abandoned, and that the charges were being reduced below the rates thereby established. Thus, the receipts for 1872 were $132,626.82; for 1873, $125,904.17; for 1874, $113,146.61; for 1875, $100,742.01; for 1876, $90,-015.67. During the year 1877 (being the last year of the City's administration of the works), there were pumped 2,-408,591,230 gallons of water, and we find it stated in the report made by the president of the defendant company to his Board of Directors that the receipts for the year were $90,-148.62, or an average of something over 37 cents per thousand gallons. So that, between the second and the last years of the City's administration, there was a difference of more than 40 per cent in the average amount received per 1000 gallons of water pumped, and a corresponding difference in the total receipts. That the City, in 1870-71, collected for all the water pumped by it, including the free water furnished, an average of 70 cents per 1000 gallons, whilst the maximum rates under the Hatch tariff, was 40 cents per thousand, is to be accounted for by the fact, that the flat rates charged to the small consumers were enormously in excess of these, predicated upon measurement, charged to the large consumers. Upon the other hand, the fact that the City, in 1870-71, under the Hatch tariff, received $148,046.91, for a total of 2,101,015,664 gallons of water pumped, whilst, in 1877, she received but $90,148.62, for a

total of 2,408,591,230 gallons pumped, amount, almost, to a demonstration that the Hatch tariff had been abandoned. There is, however, further direct evidence to the same effect, which will be more particularly referred to hereafter. The net receipts for water rents, under the City's administration, over and above the expense of maintaining, extending and operating the works, appears to have been devoted to the payment of interest on the bonds which had been issued in liquidation of the purchase price of said works, and the amount required to pay such interest, on all the bonds so issued, was $69,620.00. When, therefore, the total receipts fell to about $90,000.00, as they did in 1876, whilst the expense of maintaining and operating the plant was not far short of $60,000.00, it can readily be understood that the position of the holders of Water Works bonds was far from satisfactory. Under these circumstances, it seems not improbable that the General Assembly was induced to take action in the matter as a measure of relief to the holders of such bonds, though there is no direct evidence to that effect in the record. Be that as it may, in March, 1877, an Act was passed (being Act No. 33 of 1877) entitled "An Act to enable the City of New Orleans to promote the public health and to afford greater security against fire, by the establishment of a corporation, to be called the New Orleans Water Works Company; to authorize the said company to issue bonds for the purpose of extending and improving the said works, and to furnish the inhabitants of New Orleans an adequate supply of pure and wholesome water; to permit the holders of Water Works bonds to convert them into stock, and to provide for the liquidation of the bonded and floating debt of the City of New Orleans." The provisions of this Act, so far as it is

necessary to refer to them, are, substantially, as follows, to-wit:

Section 1 fixes the capital stock at $2,000,000, divided into 20,000 shares of $100 each.

Section 2 requires that, upon the organization of the company, certificates representing the whole amount of the stock shall be turned over to the City to be disposed of as follows, to-wit: (1) $606,600.00 to be retained as the property of the City (this, it will be remembered, being the amount of the City's interest, upon the basis upon which it purchased the works from the old company); (2) The City further to retain one share of stock for every $100 of Water Works bonds which it may have extinguished by payment, exchange, or otherwise; (3) The residue of said stock to be held by the City for the benefit of the holders of such bonds, still outstanding, and exchanged for the same on the basis of one share of full paid stock for every $100 of bonds, exclusive of the value of the overdue coupons.

Section 3 provides that, whenever the holders of such outstanding bonds, to the amount of $500,000, shall have exchanged the same for stock, a board, consisting of seven directors, shall be elected, of whom, four shall be named by the Mayor, and three, elected by the stockholders other than the City, the board thus elected to hold office until July 1, 1878.

Section 4 provides for the transfer of the works by the City to the new company.

Section 5 confers upon the company the privileges acquired by the City from the Commercial Bank, and further provides that said company "shall have, for fifty years from the passage of this Act, the exclusive privilege of supplying the City of New Orleans and its inhabitants with water from the Missis-

sippi river, or any other stream, or river, by means of pipes and conduits"; authorizes the company to purchase, lease, and enter upon, lands, dig ditches and canals, and construct such dykes reservoirs and other works "as may be required for securing and carrying a full supply of pure water to said City and its inhabitants," etc., etc.

Section 6 provides, that, upon the first Monday in July, 1878, and annually thereafter, four directors shall be elected, by all the stockholders, and that the Mayor and the Administrator of Water Works and Public Buildings and the Administrator of Finance shall be *ex-officio* members of the Board.

Section 8 provides, that the capital stock may be increased to two million dollars, for the purpose of enabling the company to improve and extend its works, the new stock to be paid for in cash, or in work.

Section 9 authorizes the company to "borrow money for the purpose of improving and enlarging its works, and increasing the supply of pure water," and, to that end, to issue bonds to an amount not exceeding $2,000,000, secured by mortgage on the property of the company, such bonds to be issued and sold, and such mortgages given, only with the consent of the City Council.

Section 10 provides, "That said company shall not declare or pay any dividends except in cash, and then only out of the net *semi*-annual, or annual, receipts, after payment of the expenses of operation and the interest on its bonded debt, nor shall any dividens be declared until the contemplated works are completed and in use."

Section 11 provides, that the City shall have the free use of water, for the extinguishment of fires and for other public pur-

poses, and that the company "shall place, free of any charge whatever, two hydrants, of the most improved construction, in front of each square where a main pipe shall be laid, from which a sufficient quantity of water may be conveniently drawn for the extinguishment of fires and for other public purposes * * * and, in consideration thereof, the franchise and property of the said New Orleans Water Works Company, used in accordance with this Act, shall be exempt from taxation, State, municipal and parochial."

Section 12 confers upon the company the right to expropriate private property and to appropriate, and use, public property.

Section 13 reads: "That the said Water Works Company, immediately after its organization, shall proceed to the erection of new works and pipes, sufficient in capacity to furnish a full and adequate supply of water, to be drawn from the Mississippi river, or elsewhere, as may be judged most expedient; that said new works and pipes shall be commenced within twelve months from the passage of this Act, and shall be, year by year, completed, so that, within five years from the passage of this Act, they shall be completed so as to give an adequate supply of water to the people of the City of New Orleans, exclusive of the Fifth district. If the said work be not done as above prescribed, said corporation shall forfeit all exclusive privileges granted herein, and the City shall have a right to contract with any one else for a supply of water, as above provided, and to expropriate the property of the corporation hereby created. After the completion of the new works and pipes, the new company shall, from time to time, as the wants of the population may require, and when the estimated revenue upon the cost

of such extension shall equal ten per centum, extend their works throughout the entire limits of the City and suburbs, and any future extension of said City; and any failure of said Water Works Company to comply with this provision shall work a forfeiture of this charter."

* * * * * *

Section 15 provides: "That the said Water Works Company " shall have the right to fix the rates of charges for water, pro- " vided that the net profits of the company shall not exceed ten " per centum per annum; and shall publish *semi*-annual state- " ments of its business and condition; and that the City Coun- " cil shall have the power to appoint a committee, of not less " than five, who shall have access to the books of said company, " and make such extracts from the same as they may deem ne- " cessary, and, in case the said profits shall exceed ten per cent., " the City Council shall have the right to require said company " to reduce the price of water in such manner, and in such pro- " portion, that the profits shall not exceed the above named " rates; and *provided further*, that the rates charged shall never " exceed the rates now paid by" (to) "the City, and in case said " company shall refuse compliance, the demand of said City " may be enforced by the writ of mandamus."

Section 16 makes it a criminal offence to "obstruct the com- " pany or its agents in conveying water to the City, or to in- " jure the works, or to pollute the water."

Section 17 provides, "That until other works are constructed " by which the present works may be dispensed with the same " shall remain under the control of the City Council, and the " superintendence thereof remain in the hands of the Adminis- " trator of Water Works and Public Buildings, but the said

"company shall be authorized to collect the revenues thereof "and apply them to the expense of operating and extending "the works." And it is further provided, that the City shall have the right to buy the works of the company at the expiration of its charter.

Section 18 provides, "That nothing in this Act shall be so "construed as to prevent the City Council from granting to "any person, or persons, contiguous to the river, the privilege "of laying pipes to the river, exclusively for his own use or "their own use."

This statute failed of its purpose, and, in 1878, the General Assembly passed Act No. 43 of that session, entitled "An Act relative to the charter of the New Orleans Water Works Company, amending Act No. 33 of Extra Session of 1877, approved March 31, 1877," which amends the Act of 1877, in the following particulars, to-wit:

Section 1 provides, that four out of the seven directors shall be elected by the stockholders, other than the City.

Section 2 amends and re-enacts section 10 of the Act of 1877, so as to make it read: "That said company shall not de- "clare any dividends except in cash, and then only out of the "net *semi*-annual, or annual receipts, after payment of the ex- "penses of operation, and gradual extension and the the inter- "est on its bonded debt."

Section 3 amends section 17 of said Act by eliminating the *proviso* whereby the City is authorized to retain control of the present works until other works are constructed.

Section 4 provides, that the delay for beginning the erection of new works, shall begin to run six months after the organiza-

tion of the company, instead of twelve months after the passage of the Act of 1877, as provided in that statute.

Section 5 reads: "That the full, complete and adequate sup-" ply of water, referred to in section 13 of said Act No. 33 of " 1877, shall be so construed as to require a supply of water at " the height of not less than fifteen feet from the ground, wher-" ever the pipes of the Water Works now exist."

Section 6 withdraws the exemption, in so far as State taxation is concerned.

Under the Act of 1877, then, as thus amended, the defendant company was organized, and, upon March 30th, 1878, elected its first Board of Directors. Upon April 9th, following, the City, by notarial act, transferred to it the entire water works property and plant. It appears from the recitals of this act that the stock of the company was then distributed as follows, to-wit:

1. Amount of full paid stock, subscribed for by the City as per the terms of the Act of 1877	$606,600 00
2. Amount issued to the City on account of Water Works bonds funded in premium bonds.	451,400 00
3. Amount issued to the City for Water Works bonds redeemed	111,500 00
4. Amount issued to holders of Water Works bonds, in exchange therefor	501,600 00
5. Amount reserved for the benefit of the holders of such bonds, still outstanding	328,900 00
Total	$2,000,000 00

The evidence shows that the bonds in question, and the stock for which they were exchanged, were, at that time, worth 33 cents on the dollar. It further shows that, in April, 1879, one

year after going into business, the company, upon a basis of $99,717.92, received for water rents, declared a dividend of 2 per cent. upon the par value of its stock, amounting to 6 per cent. on the money actually invested, and that, besides adding largely to the extent and value of its property, it has, from that time to the present, with the exception of one year, paid dividends, amounting, for some years past, to 5 per cent. per annum upon the par value of its stock, or about 15 per cent. on the original investment, and that, as a consequence, the stock has been sold as high as 128, and, in exceptional cases, even higher, and was quoted considerably above *par* during the trial of this case in the District Court.

The company, whilst, apparently, holding that it is under no compulsion to furnish clear, or pure, water, at any time during the fifty years of life which it has received, nevertheless, seemed, for a while, to consider that some sort of obligation rested upon it in the premises; and its officers, from time to time, have made reports in which they have recognized the fact that the water, as actually furnished, is unfit for most purposes for which water is used, and have expressed a desire to do something to alleviate the situation. But, for reasons given, which are not always reconcilable, nothing has been accomplished in that direction, and, so far as we are informed by the record, nothing is likely to be accomplished during the life of the defendant's charter. In the first report, of the first president, made to the Directors in 1879, he said:

"Although the water delivered to consumers is heavily
" charged with sediment, my first study was devoted to supply-
" ing an abundance, such as it is, leaving the problem of clear
" water to be solved after this has been accomplished. The

" delivery of filtered water from the Mississippi river is an ac-
" knowledged possibility, through subsidence and filtration,
" but the expense attendant thereon must deter us from adopt-
" ing this system at present."

The following year, according to the report of the same officer, provision had been made for the "abundance" to which he referred in his previous report, but the expense still stood in the way of any action toward improving the quality of the water. And the same condition was reported in 1881, and 1882. A new president was then installed, but, in the meanwhile, a litigation had arisen between the City and the company (involving the question of the liability of the company for taxes, on the one hand, and of the City for its water supply, on the other), the pendency of which seemed to operate as a bar to any steps in the direction of better water, the president reporting upon the subject, in April, 1884, as follows, to-wit:

" It is feasible and practicable for our company to supply
" the City with crystal clear water. Experiments, conducted
" by Mr. L. H. Gardiner, during the past eighteen months,
" have demonstrated, to the satisfaction of the directory, the
" practicability of thus clarifying the water of our river and of
" thus supplying our people with a water inferior to none, and
" superior to most public supplies, from whatever source de-
" rived. Settling reservoirs adapted to this system have been
" designed by Col. Cook, to be erected on grounds already
" owned by the company. Their cost, and that of the machin-
" ery, etc., is entirely within the limits of prudent investment
" for such a purpose. If the relations of the company to the
" City can be equitably determined, and the letter and spirit of
" the charter of the company fairly construed by the courts, in

"the now pending litigation, I shall strongly advocate the "adoption of the system for a clear water supply above alluded "to, to be furnished, of course, at our present tariff rates. As "matters now stand, the City is the beneficiary of our com- "pany to the extent of about half of the water we pump, and "wants to exact, additionally, the payment of a large assess- "ment for taxes. Pending these conditions, I do not recom- "mend any improvement or expenditure beyond what may be "necessary for the maintenance of our present system." The litigation thus referred to, eventually, resulted most favorably to the company; for, whilst it was held that the company was liable to the City for taxes, it was also held that the City was liable for all water furnished exceeding in value the amount of such taxes, collected, the result being, that, between 1884 and 1898, the City collected $290,239.86 in taxes, and paid for water, which, by the terms of the company's charter was to have been furnished free, the sum of $931,191.26, making a difference of $640,941.40 in favor of the company, as compared with the result if both had conformed to the provisions of the charter as written. Nothing, however, has since been accomplished by the company in the way of improving the quality of the water furnished by it. Some years after the termination of the litigation above referred to, another corporation, engaged in the business of supplying filter plants, was allowed to make the experiment of pumping Mississippi river water through its filters directly into the defendants' distributing mains, with the understanding that should the experiment demonstrate the practicability of furnishing pure water, in that way, the defendant should pay for the plant erected for its purposes, and should in any case, pay the actual cost of the experiment,

amounting to $25,000. In the meanwhile, the settling reservoirs, so frequently and confidently reported on, and by means of which, in 1884, the president assured the directors that crystal clear water could be supplied "within the limits of prudent investment," have never been constructed, and all further effort on the part of the company to furnish pure water has been abandoned, to await the result of experiments which may be made, elsewhere.

In this connection, it is perhaps proper that we should state more distinctly the conclusion which we have reached, from the evidence before us, as to the character and availability, for ordinary purposes, of the water of the Mississippi river, as taken from that stream and supplied to the people of New Orleans by the defendant company. In a report made by the defendant's able superintendent to its president and directors, in April, 1888, that officer said: "The silt, or suspended mat-" ter, carried by the Mississippi river varies from sixty grains " to fifteen hundred grains of solid matter per gallon. The " character of the silt is such as to rapidly cut and wear the " working parts of all machinery." "Silt" is defined to be "mud, or fine earth, deposited from running or standing water." (Webster's International Dict.) It is also shown that the suspended matter referred to consists, in part, or, at times, of "Kaoline," a finely divided white clay, and that the result of the admixture of silt, kaoline and water, is, in this instance, a tawny, opaque, fluid, which is not only injurious to machinery, but is undesirable for any, and totally unfit for domestic uses—even the washing of banquettes or the scrubbing of floors. Upon the other hand, it is conclusively shown that, when the material that is carried in suspension is removed,

whether by precipitation or filtration, the water becomes clear, and is uncommonly pure and wholesome, the reason therefor being, that for several hundred miles above New Orleans there is no surface drainage, the source from which streams derive most, if not all, of their organic matter, into the Mississippi river, and that such matter, of that description, as may have been swept into it, higher up, is eliminated during the passage of the water over that distance, by constant agitation and attrition in contact with the inorganic substances, carried in suspension, and with the oxygen of the atmosphere. A large percentage of this inorganic material is, however, left behind, and, whilst it is said by some of the witnesses that the water is none the less palatable and wholesome on that account the weight of the evidence is the other way, and we find nothing in the record to justify the conclusion that any one in New Orleans, habitually, drinks river water with its mud in it, or that a fluid that is capable of destroying machinery, made of iron or steel, can, with impunity, be taken, as a beverage, into the human system. The evidence, taken on behalf of the defendants, shows that, whilst Mississippi river water is highly esteemed by mariners visiting this port, it is not so used, the same witness who testifies that it is considered the "finest in "the world for sea going purposes," also says: "We always "used to settle it before stowing it for sea going purposes." Our conclusion, then, may be summarized in the following excerpt taken from a report made by one of the defendant's presidents to its Board of Directors, in April, 1882, to-wit: "Dr. "Joseph Jones, in his able report of 1881, says, that in the "year 1870, samples of the waters of the Mississippi river "were submitted to him for chemical and microscopical an-

"alysis, and from his examination, he concluded that, when "freed from superficial matter, they are of great purity and "will compare favorably with the drinking water supplied to "the largest and best regulated cities."

Upon the question of what was done by the defendant, within the limit of time fixed by its charter, to extend its works and furnish a supply of water, adequate, as to quantity, a great deal of testimony was taken, the consideration of which, for reasons which will sufficiently appear hereafter, we pretermit. And we now proceed to an examination of the facts, as disclosed by the record, touching the rates charged by the defendant and its alleged discrimination between consumers.

We have seen that the ordinance, passed by the City Council in 1870, proposing lower rates than those established by the Hatch tariff, was never promulgated, and we have also seen that it is practically demonstrated that the Hatch tariff was, nevertheless, abandoned by the City, and a much lower rate adopted, long before the transfer of the Water Works to the defendant. It is not improbable that the tariff, as thus adopted and enforced by the City, during the last few years of its administration of the works, conformed, in the main, though not altogether, to that embodied in the unpromulgated ordinance of 1870; but, of this we cannot be sure, as the most important books, showing the charges and collections made by the City, have been lost; the defendant, to whom they were delivered, with the works, and who had possession of them for several years thereafter, being now unable to account for them. Taking the evidence as we find it, it appears that, during the first four years of the defendant's administration, the proviso contained in section 15 of the Act of 1877, which reads; "*and*

provided further, that the rates charged shall never exceed those now paid by" (to) "the City," etc., was construed to mean that the company could not charge more for water than was charged by the City, before, and at the date of, the transfer of the works; and during that period, the charges were regulated accordingly. Such is the positive, uncontradicted, testimony of the gentleman who, during those years, occupied the position of president of the defendant company. And his testimony is corroborated by the figures, which we find in the record, showing the quantity of water pumped and the receipts from the sale of the same, as compared to the pumpage and receipts under the City administration. We will not go over these figures in detail. It is sufficient to say that the average receipts from water rates during the last five years of the City's administration were $98,513.23, and the average receipts during the following four years (being the first four years of the company's administration) were $93,601.95, whilst the evidence points strongly to the conclusion that the company pumped more water during that time than had been pumped by the City. The record does not show how much was pumped during the years 1874, 1875 and 1876, but it appears, as has, heretofore, been stated, that, in 1877, the City pumped 2,408,591,230 gallons, for which she received $90,-148.62; and it also appears that during the year ending in April, 1882 (being the last year of the company's first four years of administration), there were pumped 2,948,347,134 gallons, for which the company received $99,930.70, the average, per thousand gallons, received by the City being 37.4 cents, and the average received by the company being 33.8 cents. That the company received less than the City, though

pumping more water, is accounted for by the fact that there had been a large waste, resulting from leaks in the reservoirs, amounting, according to the estimate of the president of the company, to 600,000 gallons per day. The financial results thus obtained were unsatisfactory to the stockholders, who, in 1882, elected a new president. And the evidence justifies the conclusion that the company, then, deliberately abandoned the tariff of charges for water which had been enforced by the City, and by which it had, theretofore, regulated its own charges, and established a new tariff, according to which the rates were much higher. There was little or no noise made about this change of policy, but the results were soon to speak, and have spoken, for themselves. During the year 1883, the company pumped 2,900,549,214 gallons of water, as against 2,948,347,134 gallons the year before, and received $111,-794.19 as against $99,930.70, received the year before; thus pumping nearly 50,000,000 gallons less water, and receiving nearly $12,000 more for it. And the president, in his annual report, used the following language, to-wit:

"The earnest attention of the directory has been engaged in "plans for an improvement in the character of the water we "furnish; to an improvement and reorganization of the system "of records and general conduct of current business; *to the "maintenance of a proper and reasonable advance in the great "majority of the assessments,* and their equalization. * * * "The assessments (which seem to have been governed by no "fixed rule), when compared with the tariff, have been found "too low. Correction, increase and equalization have created "more or less dissatisfaction. *An increase has been estab-"lished, however, and the company is still far within the limits*

"*of its authorized tariff.*" (Italics by the court.)

In April, 1884, the president reported that he had caused the premises of each consumer to be inspected, and he, thereupon, proceeded, as follows, to-wit:

"The systematic inspection alluded to gave *data* and basis "for a material increase in the general assessment. Special "care has been taken to have all the assessments fall within "the limits of our authorized tariff, and at the same time bear "an equitable relation to each other in the various classes of "water takers. * * * The people of New Orleans have "proved willing, after a little natural remonstrance, to pay a "fair price for water supplied by the company, as is shown "by the fact that the collected revenue is $17,000 above that "of the preceding year."

During the year to which this report referred, the company pumped 2,759,022,884 gallons of water for which it received $127,228.50, being an average of 45.7 cents per thousand gallons. During the year ending in April, 1885, the company pumped a total of 2,442,611,478 gallons, for which it received, from private consumers, $129,876.08, and from the City of New Orleans, $17,085.60. Averaging the total amount of water pumped by the amount received from private consumers, only, and we find the charge to have been 53 cents per thousand gallons; whilst, if we include in the calculation the amount received from the City, the average charge per thousand gallons was 59 cents. During the year ending in April, 1886, the company pumped 2,169,399,232 gallons of water, for which it received, from private consumers, $123,228.73, and from the City, $64,239.60. Averaging the total amount of water by the amount received from private con-

sumers, only, and the charge amounted to 56 cents per thousand gallons, and if the amount received from the City be included, the average charge per thousand gallons was 86 cents. It will thus be seen that, within the four years following its change in policy, the company, upon the face of the reports made by the president to its Board of Directors, had raised the average charge for water, per 1000 gallons, about 50 per cent. above the rates previously charged by the City, in 1877, and that, including the amount received from the City, the company received an average of nearly two and a half times as much per thousand gallons, for water pumped in 1886, as the City received in 1877. During some later years, a comparison of the gross pumpage with the gross receipts may not, always, disclose the same high average, but this was not because the charge was not made, but for other reasons; as, for instance, in January, 1892, the superintendent reported that the record showed that the company pumped 100,000,000 of gallons more in November, 1891, than in November, 1888, whereas the extra quantity was neither pumped nor delivered, but was registered by reason of the defective condition, and "slippage," of the pumps. When that condition began, and how long it lasted, it would be useless to inquire. The facts which have been stated are sufficient, more particularly when considered in connection with the testimony to which we will refer a little later. What the president of the defendant company meant when he stated that the charges for water, established and enforced by the company, were "within the limits of its authorized tariff," the record does not enable us to say. It is quite certain that those charges did not, and do not, fall within the limits of the tariff established by the City, and in

force when the charter of the company was adopted, as is shown by the books of the City which were delivered to the company, and served as its guide in the matter of its charges during the first four years of its existence; and if any other tariff was authorized, evidence of that fact has not been produced. The "dissatisfaction," to which the first report refers, resulted in something more than "the little natural remonstrance," mentioned in the second. Isaac Levy, a rice miller, had been paying $150 *per annum* for his supply of water, under the City administration, and his rate had been increased to $175, upon the accession of the company, to which he made no objection, as the latter amount was within the tariff established by the City. In 1883, however, the company under its new administration, increased the charge to $400, whereupon Levy filed suit, complaining that the charge was illegal and praying that the company be compelled to accept the amount to which it was entitled, and that it be enjoined, in the meanwhile, from cutting off his supply of water. And it was finally decided, in 1886, that the company was entitled to charge no higher rate than the City had charged upon March 31st, 1877 (the date of the approval of the Act No. 33 of that year); that the rate then charged by the City, to consumers such as Levy, was fifteen cents per thousand gallons, and that the amount demanded by the company was in excess of that rate, and, therefore, unauthorized and illegal. State *ex rel.* Water Works Co. vs. Levy, 38 Ann. 25. The judgment thus rendered was affirmed, in 1887, in the case of Ernst vs. Water Works Co., 39 Ann. 550; and suits brought by several other litigants, and not appealed, appear to have been settled upon the same basis. Upon the trial of the Levy case, the president of the company, who

had administered its affairs during the first four years, testified that, during that time, the rates charged by the company had been regulated by the rates as he found them in the books of the City; and that the rate charged by the City, for water furnished in quantity and by measurement, was 15 cents per 1000 gallons; and he referred the counsel of the company to the books of the City, which were then in the possession of the company, in verification of his statement. Whether the books were then produced in court, we are unable to say from the record now before us. If they were, the result shows that their contents sustained the testimony of the witness. If they were not, it is fair to presume that it was because the company, though in possession of them, did not find it to its advantage to produce them. Since that time, the books have been lost, and as the memory of the witness who then testified as to their contents has become somewhat uncertain, after the lapse of years, it would be difficult, perhaps impossible, now, to prove what rates were charged by the City in 1877, and the defendant would have a wide latitude in the matter of its charges were it not that the testimony given in the Levy case has been preserved and affirmed by the witness who gave it.

After having had its day in court, in the several cases referred to, the defendant, apparently, acquiesced in the result reached, and, as late as November, 1890, the superintendent, in his monthly report to the president and directors, referring to a controversy which had arisen with a large consumer, informed them that he had consulted the attorney of the company as to the rate per thousand gallons that could be charged, and that, quoting the language, "he says that 15 cents per 1000 " gallons having been fixed by the Supreme Court as the legal

"rate to charge consumers, this is the rate under the circum-
"stances. I have rendered a bill in accordance, etc." He also, in the same communication, recommended that certain other consumers, whom he names, should be charged at the same rate.

But there were, and are, still other large consumers who were, and are, charged rates greatly in excess of that obtained by those with whom the controversy had arisen, rates in conformity to a tariff published by the company itself, and to which its president, presumably, referred, in speaking of its "authorized" tariff, but which fixes 15 cents per 1000 gallons as the minimum rate to large consumers, taking water by measurement, whilst the maximum rate to such consumers is 35 cents per 1000 gallons.

These rates conform neither to the Hatch tariff nor to the tariff contained in the unpromulgated ordinance of 1870, and they are largely in excess of the tariff enforced by the City in 1877; and, so far as this record discloses, there is no other authority for them than that of the company itself, exercised in plain disregard of two decisions of this court, rendered in cases to which the company was a party, to the effect that they are unauthorized and illegal. Beyond this, we find, in the pamphlet containing the tariff thus published by the company, the following rules prescribed to consumers of water, to-wit:

"Meters will be of such make and size as will be approved
"by the Water Works Company, and will be furnished and
"maintained by the consumer. * * * The furnishing of
"water through meters will be at the option of the Water
"Works Company." We also find that such meters as are permitted and approved by the Water Works Company, whilst

quite expensive (those of medium size costing in the neighborhood of $40), are rapidly cut and worn out by the action of the silt-bearing water, and that there is, consequently, great irregularity in their operation, so that one consumer, whose meter registers 1000 cubic feet, is charged with 7500 gallons of water, whilst another, whose meter registers the same quantity, may be charged with from 10,000 to 90,000 gallons, or any other quantity. And this, too, at the rate of 35 or 40 cents per thousand gallons, as against 15 cents per thousand gallons charged to the consumer whose meter measures only seven and a half gallons to the cubic foot. Thus, by way of illustration, a particular consumer, during a period of twenty-seven months, using an average of 730,000 gallons of water per month, was charged at the uniform rate of 15 cents per 1000 gallons, according to a meter which appears never to have measured more than seven and a half gallons to the cubic foot registered by it. And, at the end of that period, a flat rate of $700 per year was agreed upon, although, according to the minimum rate, by meter measurement, with a meter which allowed only the minimum quantity of water per registered cubic foot to pass through, the charge should have been $1,314. Another consumer, who during the ten months beginning February 1st, and ending November 30th, 1898, used an average of 2868 gallons per month, was charged, during four months, 40 cents, and during the other six months 35 cents per 1000 gallons, according to a meter which appears never to have allowed less than ten gallons to the cubic foot, registered by it, to pass through, and from that up to 28 gallons to the cubic foot. Again, one proprietor of a livery stable is charged a uniform rate of 20 cents per 1000 gallons, whilst

another, doing about the same business, and not far distant, is never charged less than 25 cents per 1000 gallons, and from that to 45 cents per 1000 gallons; and still another, doing a somewhat smaller business, though taking his water by meter measurement, is charged 35 cents and 40 cents per 1000 gallons, and, all this, although the maximum charge for water so taken, even according to the defendant's published tariff, is 35 cents per 1000 gallons, to consumers using from 100 to 500 gallons per day. The evidence is equally conclusive to the effect that the flat rates, charged to the smaller consumers, have been advanced and maintained, by the company, in excess of those exacted by the City during the last year of its administration.

Opinion.

The foregoing statement includes most of the facts, disclosed by the record, that we find necessary for the decision of the case. Others, which may be pertinent, will be incorporated in this opinion. Many facts have been pretermitted, because, if not wholly immaterial, they are, at least, unnecessary, to the particular issues upon which the case is to be decided. We have stated, in detail, the circumstances under which the defendant company came into existence, and the result of its establishment, regarded as an investment, in order that its exact relation to the State of Louisiana and to the City and people of New Orleans may appear fairly upon the record, inasmuch as the State, the City, the legislative committee which reported the resolution, under the authority of which this suit was brought, and the public officer by whom the suit was brought, have been made the subject of criticism,

in one of the printed arguments presented on behalf of the defendant, which appears to us to be wholly undeserved.

It will be seen from the statement, as thus made, that upon the organization of the defendant company, the City of New Orleans held $1,169,500, out of a total of $1,671,000 of its stock, actually issued, being also a majority of all the stock called for by its charter, but consented, nevertheless, that the control of the corporation should be vested in the minority stockholders, representing, at that time, but $501,600 of the stock; and that, not only was the entire water works plant which the City had acquired from the Commercial Bank, together with the extensions and improvements which had been made during the City's administration, turned over to the corporation so controlled, but that there were included grants of power, from the State, which gave to that plant its principal value, viz: The power to operate it in a corporate capacity; to expropriate private, and to appropriate and use, public, property, as the business of the company might require; the monopoly with respect to the water to be supplied to the City, and people, of New Orleans, for fifty years; and other powers and privileges, which need not be particularized. So that, the holders of the bonds, which had been given in payment for the bare plant, after the franchises necessary to its operation had expired by limitation, were enabled, with the same bonds, and without additional cost, to re-acquire all the property sold by them, somewhat enlarged and extended, together with privileges worth far more than the property itself. The bonds in question, and the stock for which they were exchanged were, at that time, worth thirty-three cents on the dollar. When, therefore, at the end of the first year, the company de-

clared a dividend of 2 per cent. it represenetd 6 per cent. upon the money actually invested; and the dividends of 5 per cent. which have been declared of late years, have represented 15 per cent. upon that original investment, and have been paid with such regularity that the stock has commanded a premium, exceeding one-fourth of its par value. The owner of the stock, acquired according to the terms of, what is called a "hard bargain," driven by a sovereign state, descending to the level of "a common trader," has therefore gained, up to the present time, nearly three times the amount of his investment, by reason of its appreciation in value, and, almost, if not quite, as much more, in the meanwhile, in the way of dividends, declared from year to year.

There are, no doubt, many of the present stockholders, perhaps a majority of them, who have acquired their holdings by purchases in the market, who have paid the ruling price for their stock, and who have realized but a fair profit upon the money invested; and our remarks in this connection, are intended for no other purpose than to show that the company was not driven by the State into making a bargain, and that the bargain as originally entered into was not a hard one, as is charged.

In 1882, the City of New Orleans sued for taxes, from the payment of which, under section 4 of the Act of 1877, the defendant was declared exempt; and the defendant, by way of reconvention, prayed judgment for the value of the water furnished to the City, which the same section declared should be furnished free of charge. It was decided by this court that the exemption from taxation was unconstitutional, but that the City should pay for its water, up to an amount equal to

the taxes recovered, leaving upon the defendant, however, the obligation to furnish the water required, exceeding that amount in value, free of charge. City of New Orleans vs. Water Works Company, 36 Ann. 432.

Thereafter, the General Assembly passed an Act (No. 56 of 1884), requiring the City to pay for all the water obtained by it in any year for which it might claim and recover taxes from the company. And a contract, made pursuant to that legislation, having been sustained by judgment of this court (Conery *et als.* vs. Water Works Co., *et als.*, 41 Ann. 913), the City has, since then, up to 1898, paid a total of over $900,000 for its water supply, as against less than $300,000 received for taxes. It was, moreover, held that the Act of 1884 was not passed for the benefit of the defendant, but was an act intended to regulate the conduct of the City of New Orleans in certain respects, and that when the City, agreeably to the terms thereof, agreed to pay for water, to which it was, under the previous decision of this court, entitled, free of charge, there was no such acceptance of benefit or waiver of obligation, on the part of the defendant, as to bring it within the provisions of the Constitution, and thereby deprive it of its monopoly, or any other franchise, which it could not, under such circumstances, have continued to enjoy.

We now proceed to inquire whether the powers and privileges conferred on the defendant, and from which it has derived such advantage, have been exercised in conformity to the conditions of the grant. It is part of the statement of facts, which precedes this opinion, that the water which the defendant furnishes and which it claims the right to furnish, at its option, whilst susceptible of clarification and purification,

is neither clear no pure. That fact has not only been recognized by the defendant and its officers, and by public officials and analytical chemists, but by the State of Louisiana in the very legislation under which the water is now supplied, to the exclusion of any better and purer water, to some 300,000 of her citizens. The Act of 1877, within which, as amended by the Act of 1878, the defendant lives and moves, as we have seen, is entitled "An Act to enable the City of New Orleans to promote the public health, and to afford greater security against fire, by the establishment of a corporation to be called 'The New Orleans Water Works Company'; to authorize the said company to issue bonds, for the 'purpose of extending and improving the said works, and to furnish the inhabitants of New Orleans an adequate supply of pure and wholesome water,'" etc.

This language plainly indicates that the attention of the lawmakers was attracted to the question of the quality of the water to be furnished, and that the act to be passed would deal with that subject. It was no secret to them that the City of New Orleans had, for thirty-five years, and more, been supplied with the water of the Mississippi river, as taken therefrom, and, if the proposed legislation contemplated only a continuance of the same supply the descriptive terms used were not only unnecessary, but inapplicable. But that such was not the purpose, is evident from the fact that the act confers upon the company the authority to obtain water elsewhere than from the Mississippi river, whereas its predecessor, the Commercial Bank, was restricted to that stream. Moreover, section 5 confers upon the corporation the power "to construct, dig, or cause to be opened, any canals or ditches, whatever, for

the purpose of conducting the water of the *rivers* from any place or places it may deem fit, and to raise and construct such dykes, mounds, reservoirs as may be required for securing and carrying a full supply of pure water to said City and its inhabitants," etc. And section 9 provides that: "The Board of Directors shall have power * * * to borrow money for the purpose of improving and enlarging its works and increasing the supply of pure water; and to accomplish this, the said Board are hereby authorized to issue the bonds of the company," etc.

This use of the word "rivers," and of the adjective "pure"; the fact that the purpose expressed by the words, "improving and enlarging the works, and increasing the supply of pure water," is immediately afterwards referred to as "this purpose," rather than "these purposes," taken in connection with the title of the act, leave no doubt that the lawmakers contemplated that the corporation which they were creating would at some time or another, either purify the Mississippi river water, if, it elected to obtain its supply from that stream, or else should bring water, which required no purification, from some other stream. The proposition that, whilst recognizing the fact that Mississippi river water, in its normal state, is not pure, they should nevertheless have undertaken to restrict a community, consiting of some hundred of thousands of persons, to its use, as their main supply, for a period of fifty years, and should have undertaken to make a law prohibiting such community from obtaining a supply elsewhere during that period, seems inconceivable, and the argument that, notwithstanding that "pure water" is mentioned in both the title and the context of defendant's legislative charter, it is intended

that it should be optional with the defendant, during the long period covered by that charter, to furnish either pure or impure water, as its interest may suggest, loses much of its force, when we consider, that if the word "pure" had been entirely omitted, the right of the defendant to furnish water of that description would have been unquestionable. But, let us suppose that the contention on behalf of the defendant, on this point, is well founded, and that it was the deliberate purpose of the lawmakers of the last generation to restrict the people of New Orleans, for fifty years (before the expiration of which period the population may increase to half a million), to the use of unpurified water, as their main supply, at the option of a private business corporation; let us suppose that, so long as the corporation fulfills its obligations under the contract, which is said to result from this law, the community affected it without remedy, and must deny itself all water, except that furnished by said corporation, at least, it must be conceded that no such result follows if the corporation disregards alike the obligations and the prohibitions of the contract, from which, alone, it *could* follow.

It is not claimed that the defendant company was granted the monopoly in question, with its other privileges in derogation of common right, entirely without conditions. And, if the lawmakers intended that it should enjoy that monopoly and those other privileges they also intended that it should observe the conditions upon which they were granted. But, one of the conditions was, that the company should charge no more for the water furnished by it than was paid to the City upon March 31, 1877. The charter of the company, under which its monopoly and all other franchises are enjoyed, con-

tains a plain, positive prohibition to that effect. And yet the evidence in this record shows that the company, from 1883 up to the present time, has grossly, deliberately and persistently, violated that prohibition, by the establishment and enforcement of a tariff of charges for water greatly in excess of that thus authorized; and not only so, but, whilst enforcing its excessive, unauthorized, and illegal charges, has unjustly discriminated between citizens and other corporations with respect to their supply of an element and a commodity, equally necessary to human existence and to human affairs. This violation of the law and of its charter obligations is not one the effect of which is confined to the company, as a business entity, or to the investment of its stockholders. It inures to their pecuniary advantage; but, in its operation, it oppresses, and has oppressed, and will continue, if allowed continue at all, in perhaps even greater degree, to oppress an absolutely dependent public. In view of these facts, the law demands that the privileges and corporate life thus abused should be withdrawn. And it requires no other law, and no other construction of law, than such as is found in, and authorized by, the Civil Code of this State, to reach such a conclusion.

C. C., Arts. 14, 18, 447; Atchafalaya Board vs. Dawson, 13 La. 497; State vs. New Orleans Gas Light & Banking Co., 2 R. 529. But the same law prevails in other jurisdictions, and the conclusion stated is sustained as well by the authorities furnished on behalf of the defendant as by those furnished on behalf of the plaintiff.

"A private corporation, created by the legislature, may lose "its franchises by a misuser, or a non-user, of them; and "they may be resumed by the government, under a judicial

" judgment, upon a *quo warranto* to ascertain and enforce the " forfeiture. This is the common law of the land, and is a " tacit condition annexed to the creation of every such cor- " poration." Territt vs. Taylor, 9 Cranch, 51.

Morawetz on Private Corporations, 1st Ed., Par. 640.

" It has accordingly been held, in various cases, that, if a corporation has assumed the performance of duties for the benefit of the public, generally, it cannot neglect the performance of those duties without incurring a forfeiture of its franchises."

"If a duty is prescribed by the charter of a corporation in express terms it seems that the company will hold its franchises upon the condition that the duty shall be performed; and, hence, an omission to perform will constitute a sufficient ground for declaring a forfeiture of the company's franchises."

"Any act of a corporation which is forbidden by its charter, " or by a general rule of law, and, strictly, every act which the " charter does not expressly or impliedly authorize the cor- " poration to perform, is unlawful; and if the doing of such " act is an injury to the public, it may be sufficient ground for " declaring a forfeiture of the corporate franchises." Morawetz, par's. 643-5.

In New York it has been held to be sufficient ground to justify the forfeiture of the charter of an insurance company that such company had undertaken to carry on banking operations in violation of a general law prohibiting unauthorized banking. People vs. Utica Ins. Co., 15 Johns. 358.

In Pennsylvania it has been held that where a bank was prohibited by its charter from making loans at a greater rate of discount than one-half of one per centum, for thirty days,

and from dealing in promissory notes, and it was shown that this provision had been wilfully and repeatedly violated, there was sufficient cause for declaring the charter forfeited. The court, through the Chief Justice, said:

"It may be affirmed, as a general principle, that where there "has been a misuser or a nonuser, in regard to matters which "are of the essence of the contract between the corporation "and the State, and the acts or omissions complained of have "been wilful and repeated, they constitute a just ground for "forfeiture." Com. vs. Commercial Bank, 28 Pa. St. 389.

In State vs. Commercial Bank of Manchester, 33 Miss. 497, the court, referring to a restriction in the charter of a bank with respect to the charging of interest, said: "The same law "which gave her existence imposed the restriction and pre-"scribed to her certain rules of action, which must be regarded "as so many conditions annexed to the grant, and as tanta-"mount to saying to the bank, 'You are now endowed with "certain rights and privileges which you can exercise and "enjoy during the period specified in the charter, upon condi-"tion that you act according to the rules therein prescribed.' "The rule prescribed as applicable to the case before us, is, "that the bank shall not take exceeding seven per cent. per "annum discount on notes having less than twelve months to "run to maturity. This rule is the law which must govern the "case before us, and the replication alleging a course of busi-"ness, persevered in for at least six months, in palpable viola-"tion of this rule, presents, in our opinion, a good cause for "forfeiture."

It is said, however, on behalf of the defendant, that according to the terms of the charter, the only remedy in the case

presented is to be found in that provision which authorizes the City of New Orleans to proceed by mandamus to enforce a reduction of charges. We do not so construe the law. Section 15 of the Act of 1877 reads: "That the Water Works Company shall have the right to fix the rates for water; provided, that the net profits of the company shall not exceed ten per cent. per annum, and shall publish annual statements of its business and condition; and that the City Council shall have the power to appoint a committee, of not less than five, who shall have access to the books of said company, and make such extracts from the same as they may deem necessary; and, in case the profit shall exceed ten per cent., the City Council shall have the right to require said company to reduce the price of water in such manner and in such proportion that the profits shall never exceed the above named rates; and provided further, that the rates charged shall never exceed those now paid by" (to) "the City, and in case said company shall refuse compliance, the demand of said City may be enforced by mandamus." This section of the law is somewhat inartificially drawn, but we are of opinion that a reasonable construction requires that the "demand," which the City is authorized to enforce, by mandamus, should be held to relate back to the demand which the City had been previously authorized to *make*, to-wit, the demand for a general reduction in the price of water whenever the profits of the company exceeded ten per centum per annum. It would be inadmissible to suppose that the individual consumer, who might be the victim of extortion practiced by the company, was to be left without remedy, and absurd to suppose that his remedy was to consist of the mandamus proceeding which the City of New Orleans was

authorized, but not compelled, to bring, under tthe condition stated in the act. Nor does the fact that such consumers might resist overcharge against them, and have actually and successfully done so, affect the rights and obligations of the State in the premises.

It is also said that, whilst the petition alleges that the defendant has been guilty of charging more than was charged by the City during the period immediately preceding the transfer of the works, it is further alleged that the tariff then enforced by the City was that embodied in the ordinance adopted in 1870, and that, as said ordinance was never promulgated, it follows that the action must fail, on this ground. We do not concur in this reasoning. The first, and material, proposition of the State is, that the charges enforced by the defendant have exceeded those which were enforced by the City, and this proposition has been established by conclusive evidence. Beyond that, it is perfectly immaterial whether the charges enforced by the City corresponded to those embodied in the unpromulgated ordinance or not. The defendant was afforded the amplest opportunity, on the trial of this case, and it has had ample opportunity heretofore, in the Levy and Ernst cases, and in several other cases, to show that the tariff enforced by the City at the date of the transfer of the works, and in March, 1877, was other than as testified to by their ex-president; and if it was unable to make such proof whilst it had the books of the City in its possession, there is no reason to suppose that it can do so now, since those books have disappeared. Holding these views, we find it unnecessary to consider the other questions presented.

For these reasons, it is ordered, adjudged and decreed that

the judgment appealed from be annulled, avoided and reversed, and it is now ordered, adjudged and decreed that there be judgment in favor of the plaintiff, the State of Louisiana, and against the defendant, the New Orleans Water Works Company, decreeing the forfeiture of the charter and of all the franchises heretofore conferred upon said defendant corporation. It is further ordered that said defendant pay the costs of these proceedings.

Breaux, J., concurs in the decree. Provosty, J., takes no part, the case having been argued and submitted prior to his appointment on this bench.

The judgment having become final, the foregoing is a true copy of the original opinion and judgment rendered in the case of State of Louisiana vs. The New Orleans Water Works Company, No. 13,701.

Clerk's office, New Orleans, ——, 1901.

————, Clerk.

No. 13,701.

STATE OF LOUISIANA.

versus

NEW ORLEANS WATER WORKS COMPANY.

ON APPLICATION FOR REHEARING.

By Mr. Justice Monroe—

The first proposition contained in the brief filed in support of the application for rehearing is, that, "the court erred in the statement," that the most important books, showing the charges and collections made by the city, have been lost, the defendant, to whom they were delivered with the works, and who had possession "of them for several years thereafter, being now unable to account for them." The books thus referred to are those showing the rates charged by the city, for water furnished by measurement, as contra-distinguished from those showing the "flat" rates charged, to small consumers. It is not denied that they were delivered to the defendant, with the works, nor is it denied that they were in the possession of the dfendant for several years thereafter, nor, yet, is it denied that they were called for by the plaintiff for the purposes of the trial of this case in the District Court and that the defendant was unable to produce them. It is said, however, that the court has erred in attributing undue importance to the particular books mentioned, and in intimating, in the statement quoted,

and throughout the opinion, that the defendant appears "in the very equivocal position of a spoliator of evidence."

We avail ourselves of the opportunity to say that it was not the purpose of the opinion handed down, nor is it the present purpose, to charge the defendant, either directly or by implication, with deliberately spoliating or suppressing evidence of any kind. We think, and we shall endeavor to show, more clearly than we have done, that the books in question bear such an important relation to this case, as to furnish, now, almost the sole measure of the obligations of the defendant and of the rights of the public and of the state in the matter of the charges for water supplied by measurement, and hence, that it was the duty of the defendant to have preserved them in safety and in such manner as that the state and the public, as parties in interest, could at all times have obtained access to them; but, that the defendant has failed to discharge that duty, and that the loss of the books is attributable to it's gross negligence, the beginnings of which appear to have been co-incident, in point of time, with it's determination that it would no longer be governed, in the matter of its charges, by the rates which had been paid to the city, and which were recorded in those books; and, for these reasons, that the defendant is not in a position to complain of any reasonable indulgence extended to the plaintiff, in its effort to establish the contents of the books by secondary evidence.

It was stated by one of the counsel for the defendant, in oral argument before this court, that, by referring to the briefs in the cases of Ernst & Co., and Stewart & Rickert *vs.* N. O. Water Works Co., it would be found that the missing books had been brought up with the appeals in those cases, and had

been filed, in the originals, in this court, fifteen years ago; and it was also stated that an unavailing search had been made for them in the clerk's office, and these statements are reiterated in the brief which we are now considering. It does not appear that any such return was made to the *subpœna duces tecum* issued for the purposes of the trial in the District Court, or that the search referred to was instituted at that time; and, as the "case" of Ernst & Co., with which that of Stewart & Rickert was argued in this court, was admitted in evidence on that trial over the objection of the counsel for the defendant, who still insist upon their objection, and further insist that nothing was offered or admitted save the "record," we should hardly have expected that they would rely, as they are now doing, upon the briefs in that case, as showing that the defendant was able to account for the books which it was unable to produce when called upon, and this more particularly as it was stipulated that the transcript, in the case of Ernst & Co., on file in this court, should not be used for the purposes of the appeal and it does not appear that the brief attached thereto were ever called to the attention of the District Judge. We have, nevertheless, in response to the invitation of the counsel, examined the briefs in the cases mentioned, as also the transcripts, and, having extended our inquiry to the cases of Levy; Allen & Syme; Louis Ruch; and Warner & Hoelzel, against the defendant, which "cases" or "records" were also offered in evidence on behalf of the plaintiff, we find the following state of facts, to-wit:

In the month of October, of the year 1883, that being the second business year, dating from April 1882, of the administration of the Water Works under the defendant's new president, and of the operation of what that officer reported as "a

proper and reasonable advance in the great majority of the assessments," the plaintiffs above named instituted suits in which they alleged and complained, that they were engaged in rice milling in New Orleans, and required steam power; that their only means of obtaining water for that purpose was through the works controlled and operated by the defendant, since the defendant was claiming and exercising the exclusive privilege of furnishing the water supply to the inhabitants of New Orleans; that, by law, and by the terms of its charter the defendant was bound to furnish the water required by them at the rates paid to the city upon March 31st, 1877, but, that defendant refused to receive payment at those rates, refused to furnish water unless much higher rates were paid, and had threatened to harass the plaintiff unless its demands were complied with; and, that the plaintiffs feared that it would cut off their water supply entirely unless restrained from so doing, and they prayed for injunctions and for judgments decreeing that they were entitled to water at the rates paid to the city upon March 31st, 1877.

The Levy case was tried and there was judgment for the plaintiff from which the defendant appealed, and lodged its appeal in this court on October, 1885. The other plaintiffs were represented by the same counsel, and, beyond the issuance of the injunctions prayed for by them, further proceedings in their cases appear to have been, in the meanwhile, suspended.

Upon the trial of the Levy case, the rates charged by the city, as shown by the books in question, and as charged by the defendant during the four years immediately following its acquisition of the works, were established by the testimony of the

gentleman, who, during that time, had been the defendant's president. We make the following excerpt from that testimony: "Did you ascertain in any way the rates that had been charged by the city immediately previous to your taking charge? A. I was guided by that. Q. How do you mean? A. The assessment of the previous years. (Objection) Q. Were you informed as to what the assessments of previous years had been? A. I found them in the books. Q. Were the books containing those assessments in the possession of the Water Works Company at the time you took charge? A. Yes, sir. Q. You say you were guided by them in making your assessments for the first year? A. Yes, sir. Q. Do you mean by that that you took those assessments? A. I do. Q. And proceeded to collect on that basis? A. I did, that is, as much as possible. Q. How long was that course continued? A. Until the time I left there. (Cross Ex.) Q. Did you leave those books with the Water Works Company at the time you left? A. Yes, sir."

The transcript of appeal in the case in which this testimony was taken, and which by agreement of counsel we were to have used (subject to the objections urged) for the purposes of the instant case, cannot be found, and when the original opinion was prepared, not having taken into consideration the sources of information to which we are now referred, we were unable to say whether the books, themselves, had been offered. In the brief filed on behalf of the defendant in the cases of Ernst & Co. and Stewart & Rickert, however, we find the following statement, to-wit: "At this time," (*i. e.* when the Levy case was tried) "the books in which the water rates of the city were recorded were missing and could not be found. Since then

they have been found and are in evidence in this case, being brought up in the originals, by stipulation." The cases of Ernst & Co. and Stewart & Rickert were tried in 1886, after the judgment in the Levy case had been affirmed on appeal, and there were judgments for plaintiffs, as in the Levy case, which were also affirmed on appeal. So that, in the Levy case, the books in question being missing, the plaintiff obtained judgment upon establishing, by means of the testimony of the defendant's former president, "the water rates of the city" recorded therein, and otherwise proving that the amount demanded of him exceeded those rates. And, thereafter, the books being produced and offered on behalf of the defendant, Ernst & Co. and Stewart & Rickert obtained like judgments before another judge of the district court, and in this court, upon establishing the same facts, *by means of the books*, as well as of the relevant testimony which had been given in the Levy case and which was admitted by consent of the counsel on both sides, following which, as we undestand the evidence, like judgments were rendered by the district court in the cases of Allen & Syme, Louis Ruch and Warner & Hoelzel; and, from these last mentioned judgments no appeals were taken. The transcripts in the cases of Ernst & Co. and Stewart & Rickert were lodged in the office of the clerk of this court in March 1887, and the judgments appealed from were affirmed in May of the same year. The books in question, brought up in the originals, and not incorporated in the transcripts, were, in all probability, not filed at all. If they were filed the records of this court fail to show it.

In any event, after the litigation, for the purposes of which they were deposited in the clerk's office, had terminated, the

defendant, as the owner and depositor, was at liberty to have withdrawn them, and, as no one else had that right, it is not unreasonable to suppose, in the absence of evidence to the contrary, that the books were withdrawn by it, rather than that they should have disappeared by reason of any failure on the part of the clerk properly to discharge his duty as custodian. If they were so withdrawn, and have since been lost by the defendant, as they appear to have been lost during the trial of the Levy case, it is not surprising that the search recently made by counsel, no doubt in the utmost good faith, in the clerk's office, was barren of results. If the defendant did not withdraw the books, after the cases of Ernst & Co. and Stewart & Rickert were decided, it seems to us that some explanation should be offered for its failure to do so, for this court had, then, three times decided that the rates paid to the city, *as recorded in those boks*, were the rates by which the defendant was bound to regulate its charges during the many years of its prospective existence, and the information afforded by the books was, therefore, of vital concern in the matter of the discharge by the defendant of its obligations under its contract and of the protection of the rights of the state and of the city of New Orleans and its inhabitants, as parties to, and beneficiaries of, that contract, since, as the years pass, it can well be understood that it becomes not only difficult but impossible to obtain that information from any other source. Whether, therefore, the defendant withdrew the books, and lost them, or whether they have been lost by reason of its failure to withdraw them, the indisputable fact is that, having the exclusive control of records affording information by means of which it was bound to regulate its charges for water sold by measure-

ment, it has so exercised that control as to dispossess itself of those records and to cut off the parties against whom such charges are to be made from access to that information, and, having done so, it now assumes the right to enforce a tariff of charges established by itself.

It is said that the court erred "in using as evidence in this cause the records in the cases of Isaac Levy and of others as against this defendant, for the reason that the using of the records in said cases was objected to as being *res inter alios acta and* inadmissible in evidence, and admitted over objection, and to which admission exceptions were noted and reserved; and that the evidence adduced in said causes was neither offered, nor admitted, in evidence on the trial of this case."

The consideration, moving to the state, in the contract, the violation and non-fulfillment of which is the cause of action set forth in the petition of the state, was the defendant's obligation, among others, to furnish the inhabitants of New Orleans with water, at a certain price. The state alleges that the defendant has violated that contract, and the law, by exacting a price for the water furnished by it in excess of that so agreed upon and authorized. It can hardly be denied that the individuals, for whose benefit, and with respect to whose water supply the state entered into the contract with, and granted to, the defendant the monopoly which it enjoys, are competent witnesses in this case to show that they have been overcharged and that they have complained of the overcharges, and it is admitted, in the argument, now presented on behalf of the defendant, that such individuals had, and have, the right to go into court, contradictorily with the defendant, and without making the state a party, for the enforcement of that contract with re-

spect to such overcharges. And, yet, we are told that the fact that those individual beneficiaries have obtained relief by means of judgments against the defendant decreeing such violations of the contract sued on to have been committed is irrelevant to the present issue. We do not find it necessary to discuss this proposition.

It is further contended that the offers made by the plaintiffs were of the "records" in the cases mentioned and that such offers did not include the evidence and, hence, that such evidence should not be considered for the purposes of the case now under consideration. It is only necessary to say, in answer to this, that we have not considered the evidence referred to except that of the ex-president of the defendant company, which, it is admitted, was specially offered.

It is said that the court erred in admitting, or using, the alleged testimony of Edward Toby, alleged to have been given in the case of Isaac Levy vs. New Orleans Water Works Company, which alleged testimony was admitted over defendant's objection and a bill of exceptions reserved to the admission of the same, and this court also erred as to the weight and effect to be given to said testimony, if admitted."

In support of this criticism, it is contended that the typewritten document, purporting to contain testimony given by Mr. Toby (who is the defendant's ex-president), in the Levy case, and offered as such, was not sufficiently identified, and this finds some support in the fact. But the Levy *"case"* and the *"cases"* of Ernst & Co. and of Stewart & Rickert were also offered, with the stipulation that the transcripts, in this court, should be used; and, whilst the transcript in the Levy case is missing, we find, in the transcripts in the other two cases, the

testimony of Mr. Toby, given in the Levy case, offered and admitted, by agreement; and, in the brief filed by the defendant's counsel, in the two last mentioned cases, to which brief we have been especially referred for the purposes of the present application, that testimony is reproduced and made the subject of criticism. It can hardly be said, therefore, to lack identification. But, it is said, the testimony was not admissible, *per se*, and the typewritten instrument would have been admissible "only as a memorandum, made by a third person, and recognized by the witness as constituting a correct repository of facts, which he, many years ago, knew to be true and which facts were perpetuated in the document in question," therefore, as Mr. Toby was unable either to recognize the instrument or to remember the facts which it purported to perpetuate, the testimony should not have been admitted. Sir J. Stephens, in his "Digest of the Law of Evidence," states the common law rule applicable to the question to be, that "Evidence given by a witness in a previous action is relevant for the purpose of proving the matters in a subsequent proceeding, or in a later stage of the same proceeding, when the witness is dead, or insane, or so ill that he will probably never be able to travel, or is kept out of the way by the adverse party, or, in civil, but not, it seems, in criminal, cases, is out of the jurisdiction of the court, or, perhaps, in civil, but not in criminal, cases, when he cannot be found; *provided*, in all cases: (1) That the party against whom the evidence is to be given had the right and opportuity to cross-examine the declarant, when he was examined as a witness; (2) that the questions in issue were, substantially, the same in the first as in the second proceeding; (3) that the proceedings, if civil, were between the same parties,

or their representatives in interest; (4) that, in criminal cases, the same person is accused upon the same facts." Stephens, Dig. Art. 32.

There is no doubt that the defendant in the instant case had the right and the opportunity to cross-examine the declarant when he was examined as a witness, and that it availed itself thereof. The questions at issue in the Levy case were, whether the defendant was charging more for water furnished in quantities than had been paid to the city, and whether, in so doing, it was violating the law of its existence and of the state; and it was upon those identical issues that this case has been decided. It is conceded in the present argument that Levy and the other rice millers had the right to bring their suits on the identical contract, made, in their behalf, by the state, upon which the state, itself, brings the present suit. It is said, however, that the witness was neither dead, nor insane, nor sick, nor inaccessible, but, when put on the stand, was unable to identify the document purporting to contain his former testimony, which had not been written by him, or to remember the facts therein stated. Mr. Chase, in his edition of Stephens Digest, says: "There are three cases of refreshing memory: (1) When the witness, by referring to the writing, is enabled to recollect the facts, and can testify, in reality, from memory; (2) when the witness, after referring to the writing, does not recollect the facts, and yet remembers that he made or saw the writing when the facts were fresh in his mind and that it then stated the facts correctly; (3) when the witness, after referring to the writing, neither recollects the facts, nor remembers having seen it before, and yet, from seeing his handwriting

therein (as in signature, contents, or both), is enabled to testify to its genuineness and correctness.

Chase's Stephens Dig., Arts. 136, 341-2. *Notes.*

But the reason upon which they are founded is somewhat broader than the rules as thus stated by the text writers, and the courts have not hesitated to appeal to the former when the latter have been found too narrow for the case to be decided. Thus, what matters it whether the witness, who is unable to remember the facts testified to on the former trial, identifies the instrument in which his testimony is preserved, or whether the genuineness of such instrument is established by the admission of the person against whom it is offered, or in some other satisfactory way, so long as he is able to say that the testimony as given was true? Mr. Toby could not have been expected to identify a type-written instrument which he had never before seen, but he could testify, and he did testify, in substance, that if the testimony contained in the instrument exhibited to him was that given by him in the Levy case, it was true and he stood by it, though, by reason of the lapse of time (fifteen years) and his age, he was no longer able to remember the facts testified to. And that it was the testimony, so given by him in the Levy case, is abundantly shown by the admissions and evidence to which we have already referred.

"Where a witness has given his deposition, and, afterwards, upon being called to the stand to testify, his memory of the transaction fails, his deposition may be read in evidence by the party calling him." Jack vs. Woods, 29 Pa. St. 325.

In Lawson vs. Jones 61 How. Pr. 424, the question was, whether a party who had been examined on the first trial and was rendered incompetent by the death of his adversary be-

fore the second trial could have his testimony, given on the former trial, read at any subsequent trial, and Judge Daly (of the Court of Common Pleas of New York, the entire bench concurring) held, that "there is no substantial reason why the testimony in such trial should not be read. The party was on the stand, and could have been cross-examined, and the same opportunity for scrutiny and for contradiction existed as if the jury had agreed upon a verdict. The objection, taken upon appeal, that the testimony cannot be read by the stenographer, who took it down on the former trial, from his notes, but must be produced in the form of depositions, reduced to writing and subscribed by the party, is not good. Such a rule would exclude all testimony taken in the manner authorized by law, and render the Code inoperative." Rice on Ev., Vol. 1, pp. 395-396.

We might say the same thing in this case, since the testimony of witnesses in civil cases is taken in most, if not in all, of the District Courts of this state by stenographers, and is not signed by the witnesses. And this practice is recognized in other jurisdictions, where the rule referred to by Judge Daly, predicated upon the practice which had obtained before courts and litigants had begun to avail themselves of the services of stenographers, has been disregarded. Thus, Mr. Bradner says: "A transcript made by an official stenographer and duly certified by him to be a verbatim transcript of his notes of the evidence given upon a former trial is admissible." (Citing, Bridgman vs. Carey, 62 Vt. 1; Com. vs. McCarthy, 152 Mass. 577; Com. vs. Doughty, 139 Pa. St. 383; Stege vs. State, 127 Ind. 15; State vs. Byers, 16 Mont. 565.)

Bradner on Ev. 477 (and note.)

It is further suggested that the court erred in the matter of the weight and effect to which the testimony of Mr. Toby is entitled, and we are invited to consult the brief filed by the defendant's counsel in the "Edwards" record as showing the contents of the missing books, excerpted in rebuttal of that testimony. This is probably a typographical error, and we assume that the counsel is referring us to the brief in the case of "Ernst & Co.," in which we find excerpts such as those indicated. But this court had before it at that time not only the excerpts made by the defendant's counsel and other excerpts, made by the counsel for the plaintiff, but it had the books, themselves, as also the testimony of Mr. Toby, and it, nevertheless, reached the same conclusion as had been reached in the Levy case, the judgment in which was predicated upon the testimony of Mr. Toby, without books or excerpts. We find nothing in the case as now presented, therefore, to justify us in holding that we, or our predecessors, have committed the error suggested.

It is said that "the court erred in multiplying by ten (through a clerical error) the average amounts realized by the defendant from the sale of water by it pumped from the Mississippi river and distributed through its mains to the people of the City of New Orleans, which clerical error is vitally important, because apparently, showing a revenue derived by defendant from its sales of water ten times greater, in the average per gallon, than justified by the evidence, even as construed by the court." This error is admitted, but it does not affect the conclusion reached. The purpose was to show that, from a certain date, the defendant received more money for less, or for an equal quantity of, water, than had been received by the city

and that the average amount received, per gallon, was larger. In order to establish the latter proposition, the total amounts received by the city and by the defendant were divided by the number of gallons pumped by them, respectively, and the quotients were stated in tens when they should have been stated in units. As the same error was committed on both sides the only cause of complaint lies in the fact that it was made to appear that the average amount, per gallon, received by both the city and the defendant was larger than it really was. Beyond this, we agree with the learned counsel that the proposition as demonstrated, to-wit: that the defendant received more money for less water and a larger average price, per gallon, than the city, would be insufficient, in itself, to support the judgment rendered. The fact proved was, however, merely one of a number, leading to the same conclusion and used in a process of inductive reasoning to establish that conclusion. It might have been omitted and the result would have been the same.

It is said that the court erred "in finding that the rates charged by the defendant are, or were, at any time, greater than any city tariff, or alleged city tariff, either the so-called "Hatch" tariff, or the alleged tariff of 1870, and that there is no evidence in the record showing or tending to support such finding." No attempt was made to show that the rates enforced by the defendant exceeded those established by either of the tariffs mentioned. On the contrary, it was distinctly held that the "Hatch" tariff had been abandoned; that the tariff of 1870 had never become operative; and that the only question to be determined was whether the defendant's charges have been in excess of those *actually made by the city, in March 1877, as shown by the books of the city.* The defendant's president,

elected in 1882, referring, in his annual reports from time to time, to the "dissatisfaction" and "little natural remonstrances" which resulted from his advancing the price of water, was at some pains to say that the advances were within the company's *"authorized tariff."*

The learned counsel, in a brief heretofore filed in this case, said: "Whilst we contend that the 'Hatch,' or 'Bragg,' tariff was, unquestionably, the one in force in 1877, still we cannot see that, in so far as this particular case is concerned, it will make much difference whether the one or the other" (the Hatch tariff or that of 1870) "be adopted, because there is scarcely a bill, of the five hundred, or more, offered in evidence by the plaintiff, which is as high even as the rates allowed by the alleged tariff of 1870." The gentleman who, as president of the company, administered its affairs during the four years, from 1878 to 1882, immediately succeeding its acquisition of the works, gave the following testimony in the Levy case, whilst under cross-examination, in 1885, by one of the present counsel for the defendant, to-wit:

"Q. Do you know anything about any Bragg tariff? A. There was a tariff, I think it was the 'Hatch.' General Bragg was in charge of it during the city administration. Q. What do you know about that? A. Well, that had been abandoned. Q. By whom? A. By the city. Q. How do you know? A. By the books, by their hydrant books. Q. Tell us in what instance they had abandoned it? A. Because they had reduced their charges, they had been greatly reduced and the city had been reducing it for several years. Q. What do you mean by the city? A. The City Administrator of Water Works. Q. When did they abandon it? A. The books show that. They were

the only evidence I had of it, for a year before I took charge." It is also shown, as we think, that the rates charged by the city in 1877 were lower than those established by the unpromulgated tariff of 1870. In view of this testimony and of the express prohibition in the defendant's charter to the effect that it should charge no more for water than was "*actually paid to the city in March, 1877*, it is difficult to understand how it can be contended that the "Hatch tariff was in force at that date, or that the defendant could have had any other "authorized tariff" than such as was to be found, and as the defendant actually found during its first four years of existence, recorded in the books of the city.

It is said that the court erred "in applying the vague term 'large consumers,' not only to Isaac Levy, and the other rice millers, similarly situated, who sued for a reduction of water rates, in 1884, or thereabouts," (the suits were brought in October, 1883) "but to consumers using far less water than said Levy and others, and in the failure to find what was meant by 'large consumer,' and who was entitled to be considered as a 'large consumer.'" The whole course of the defendant, since 1882, and the arguments which its counsel have addressed to this court in the instant case show that it has proceeded upon the theory that because there was no regularly adopted and published tariff in force at the date of its acquisition of the works, the prohibition against its charging more for water than was actually paid to the city at that time must be read out of its charter and held to be of no effect; and, the books showing what was so paid having been lost, whilst under its control, the most strenuous effort has been made to exclude probably the only evidence which is now obtainable as to their contents. That

evidence was introduced in the Levy case in the absence of the books; and in the absence of the books, the district court and this court found that Levy, who was shown to have consumed 1,237,500 gallons of water during the milling season, of eight months, was overcharged, and that he was entitled to water at the price which he, and others similarly situated, had paid to the city, to-wit: at the rate of 15 cents per thousand gallons. Referring to the judgment appealed from, this court said: "The judgment is based on as reliable *data* as can be obtained. It is more favorable to the company than the computation warrants, but the plaintiff does not complain." Levy vs. Water Works Co., 38 Ann. 28. The cases of Ernst & Co. and of Stewart & Rickert were afterwards tried, with *the books,* and, also, with the testimony, as to their contents, which had been given in the Levy case. What the books showed was, in view of the decision which had been rendered in the Levy case, the most important question to be decided, and it was elaborately argued. In one of the briefs to which we have referred (that of the plaintiff's counsel) it was said: "Your Honors, by examining those books may see that, although charges over fifteen cents a thousand gallons were made for water where the annual consumption was less than a million gallons, yet there is no case where the consumption of water was over a million gallons where the charge was over fifteen cents per thousand gallons." In the brief filed on behalf of the defendant this statement was contested, and what purport to be extracts from the books were reproduced, and it was said, in regard to them: "The extracts cover a period of time when the city used meter measurements in estimating quantity. The average highest charge per thousand gallons during the period of meter meas-

urements was 26½ cents. The average lowest 21 cents. The average amount paid for water 23 1-5 cents. The highest rate shown on the tables was 40 cents per 1,000."

Turning to the extracts referred to we find that they begin with water furnished in 1868 and that some of them show the charges made in 1876 and 1877, and other do not. In any event, it is evident that the averages thus arrived at had nothing to do with the question before the court, which was, what was the amount charged upon March 31st, 1877? And it must have been so considered since the position of the plaintiffs was sustained and there were judgments in their favor. It was, therefore, judicially ascertained, contradictorily with the defendant, in the cases mentioned, that a person who used 1,237,500 gallons of water, or more, in eight months, was entitled to such water at the rate of fifteen cents per 1,000 gallons, and, although it was not held that a person using less would not have been entitled to it at the same rate, it seems fair to suppose, from the arguments presented, that a person using less than 1,000,000 gallons a year would have been required to pay a higher rate. These last mentioned cases were decided, as we have already stated, in 1887. The evidence in the instant case shows that, in 1894, the Cosmopolitan hotel used 4,838,693 gallons of water for which it paid the defendant at the rate of 30 cents per 1,000. It is said that this was an exceptional case, but no reason is given why it should have been so, except that the proprietor of the hotel paid his bills without objecting. That, we apprehend, is what the uncomplaining mass of the people have been doing. If, upon the other hand, we believed that the only fault of the defendant lay in exceptional overcharges we should be willing to attribute such over-

charges to error or accident. But such is not the case. In 1898, the defendant, acting upon the theory that it was bound by no established rates, published a tariff or it's own making, in which we find the following:

"For daily average of 100 to 500 gallons, per 1,000 gallons, 35 cents.

"For daily average of 500 to 2,000 gallons, per 1,000 gallons, 30 cents.

"For daily average of 2,000 to 4,000 gallons, per 1,000 gallons, 25 cents.

"For daily average of 4,000 to 5,000 gallons, per 1,000 gallons, 20 cents.

"For daily average of 5,000 to 10,000 gallons, per 1,000 gallons, 15 cents.

"For consumption above 10,000 gallons, daily, special rates."

From this it will be seen that a person consuming a maximum of 5,000 gallons a day or 1,825,000 gallons per year was required to pay at the rate of 20 cents per thousand, which was five cents in excess of the rate for which it had been held, more than ten years before, that Levy was liable, though there was no appreciable difference in the average daily consumption, and the gross amount consumed in the twelve months would be nearly 600,000 gallons more than was consumed by Levy, as the latter used the water during only eight months. So, according to the defendant's tariff, a person consuming a maximum of 4,000 gallons a day, or 1,460,000 a year, would be charged at the rate of 25 cents per thousand. And yet, we think, within the meaning of the Levy case, and the other cases which have been decided against the defendant, and within any rasonable interpretation of the words, that a person who uses 1,460,000

gallons of water a year is a "large consumer." Beyond this, for the purposes of the present application, we have made a further and more critical examination of a number of the books showing the flat dates paid to the city, in the years 1876-7 and 1877-8, by small consumers, and we have satisfied ourselves that there was no error in the statement, contained in the opinion handed down that "the flat rates charged to the smaller consumers have been advanced and maintained by the company in excess of those exacted by the city during the last year of its administration."

The proposition that no decree of forfeiture should be rendered in this case, except upon a tender, by the state, to the defendant, of the bonds which were given by its stockholders in exchange for their stock, appears to us to be unteable. The defendant was established, as private corporations are usually established, by, and for the benefit of, its promoters, who held the bonds of the City of New Orleans, and as a measure of relief which no doubt many other creditors of the city would have been glad, at that time, to have had extended to them. The only consideration received by the state for the valuable privileges granted by it was the advantage which it was supposed would inure to a community of her citizens from the faithful discharge by the corporation of the obligations assumed by it, and the corporate and other franchises were granted upon the condition, that, if those obligations were not faithfully discharged, the franchises would be withdrawn. This was, and is, the law of this state, which entered into, and became a condition of, the contract, and the decree of forfeiture is merely the enforcement of that condition.

REHEARING REFUSED.

MONROE, J.

STATE OF LOUISIANA

versus

NEW ORLEANS WATER WORKS COMPANY.

ON APPLICATION FOR REHEARING.

January, 1902.

SYLLABUS.

1. A private corporation, upon which has been conferred the exclusive privilege of supplying water to a large community, for a number of years, upon condition that its charges shall not exceed those paid to the municipal corporation which preceded it in control of the works, and which is vested with possession and control of the books of the municipal corporation in which those charges are recorded, and which, therefore, serve as the most authentic evidence of the measure of right and obligation between such private corporation and the community, should preserve such books in safety, and failing, satisfactorily, to account for them, must be held guilty of negligence, and can derive no advantage from their loss.

2. In a suit by the state to have decreed forfeited the charter of such corporation for the violation of its prohibitions and the non-fulfillment of its obligations, records in suits, litigated between the corporation and members of the community affected, in which such violations and non-fulfillment, *quoad* the individual litigating, have been judi-

cially ascertained and determined, are admissible in evidence as against the defendant.

3. So, also, the testimony of a witness given upon the trial of such a suit, between the corporation and a member of the community affected, may be admitted in evidence for the purposes of the suit brought by the state, though the witness, when placed on the stand, is unable to identify the typewritten instrument purporting to contain such testimony, and by reason of the lapse of years and advancing age, is unable to recall the facts to which he formerly testified, *provided*: that the instrument is otherwise identified as containing the testimony which had been given by the witness and the witness affirms that such testimony was true when given.

UNITED STATES OF AMERICA.

STATE OF LOUISIANA.

SUPREME COURT OF THE STATE OF LOUISIANA.

I, THOMAS MCCABE HYMAN, clerk of the Supreme Court of the State of Louisiana, do hereby certify that the foregoing pages contain a true copy of the pleadings had in the Civil District Court for the parish of Orleans, in a certain suit wherein the State of Louisiana was plaintiff and the New Orleans Water Works Company was defendant, which record is on the files of this court under number 13,701, and also a true copy of the opinion and decree delivered by this court in said suit.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of this Honorable Court, at the City of New Orleans, this the 4th day of Feby *Anno Domini*, one thousand nine hundred and two, and in the one hundred and twenty-sixth year of the United States of America.

T. McC. Hyman *Clerk.*

UNITED STATES OF AMERICA.

STATE OF LOUISIANA.

SUPREME COURT OF THE STATE OF LOUISIANA.

I, FRANCIS TILLOU NICHOLLS, Chief Justice of the Supreme Court of the State of Louisiana, do hereby certify that Thomas McCabe Hyman is Clerk of the Supreme Court of the State of Louisiana, that the signature of Thomas McCabe Hyman to the foregoing certificate is in the proper handwriting of him the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal, at the City of New Orleans, this the 4 day of Feb., *Anno Domini*, one thousand nine hundred and two.

Francis T. Nicholls

Chief Justice.

STATE OF LOUISIANA:

I, THOMAS MCCABE HYMAN, Clerk of the Supreme Court of Louisiana, do certify that the foregoing pages do contain a true and correct copy of the pleadings and of the opinion and decree of the Supreme Court of Louisiana in the case of the State of Louisiana versus the New Orleans Waterworks Company, No. 13701, of the docket of the said Court.

IN TESTIMONY WHEREOF, I have hereunto affixed my hand and the Seal of the said Court this day of 1902.

I, FRANCIS TILLOU NICHOLLS, Chief Justice (Presiding), of the Supreme Court of Louisiana do certify that Thomas McCabe Hyman, whose genuine signature and the seal of the Court is attached to the foregoing certificate, was at the date thereof Clerk of said Court and that his attestation is in due form of law.

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